

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

- - - - - x
FAIRFAX COUNTY WATER :
AUTHORITY, :
Plaintiff : Civil Action No.
vs. : 2008-16114
CITY OF FALLS CHURCH, :
Defendant :
- - - - - x

Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, Virginia 22030

September 22, 2009

VOLUME VI

The parties met, pursuant to the notice of
the Judge, at 10:19 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

1 APPEARANCES:
 2 On Behalf of the Plaintiff:
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 20
 21 ALSO PRESENT: Charles Murray, Fairfax County Water
 22 Authority; John Tuohy, City of Falls Church

1 EXHIBITS
 2 EXHIBIT NO. RECEIVED
 3 DEFENDANT'S
 4 37 E-mail from Charles Murray
 5 to Wyatt Shields, dated
 6 12/19/06 1374
 7 41 E-mail from Jamie Bain Hedges
 8 to Falls Church Repository,
 9 dated 2/11/09 1309
 10 72 Bill of Complaint, Fairfax
 11 Water v. City of Falls Church,
 12 dated 4/03/59 1300
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 3 SON H. NGUYEN 1158 1234 1283
 4
 5 Designations of Rule 4:5(b)(6) deposition of
 6 Fairfax County Water Authority 1285
 7
 8 CHARLES M. MURRAY 1295 1340 1372
 9 JOHN TUOHY 1375
 10
 11 EXHIBITS
 12 EXHIBIT NO. RECEIVED
 13 PLAINTIFF'S
 14 Rebuttal 26 E-mail by Charles Murray 1367
 15
 16 DEFENDANT'S
 17 2 Fairfax Water Press Release 1302
 18 15 Letter from Fred Morin to
 19 Carol DeLong and City of
 20 Falls Church Council Members,
 21 dated 4/15/85 1324
 22

1 PROCEEDINGS
 2 - - - - -
 3 THE COURT: Good morning. Sorry we're
 4 running late. I'm sure you all saw, it's really
 5 busy over here.
 6 Let's see. Mr. Thomas, please call your
 7 next witness, sir.
 8 MR. HOLZHEIMER: Your Honor, the City
 9 would call Son Nguyen.
 10 THE COURT: Pardon?
 11 MR. HOLZHEIMER: The City is going to
 12 call Son Nguyen.
 13 THE COURT: Son Nguyen. All right.
 14 Whereupon,
 15 SON H. NGUYEN
 16 was called as a witness, and, having first been
 17 duly sworn, was examined and testified as follows:
 18 THE COURT: Yes, sir.
 19 DIRECT EXAMINATION
 20 BY MR. HOLZHEIMER:
 21 Q Mr. Nguyen, could you please state your
 22 full name for the record.

1 A My name is Son, S-O-N. Middle name is
 2 H. Last name is Nguyen, N-G-U-Y-E-N.
 3 Q And are you presently employed at the
 4 City of Falls Church?
 5 A I'm employed as part-time employee. I
 6 retired in 2005.
 7 Q Okay. How long -- I'm sorry. Are you
 8 done?
 9 A April 1st.
 10 Q And how long have you been with the
 11 City?
 12 A I have been, including my part-time now,
 13 21 years with the City of Falls Church.
 14 Q Okay. And when did you first join the
 15 City?
 16 A I first joined the City June 1988.
 17 Q Okay. And can you please explain to the
 18 Judge the various positions that you've held at
 19 the City?
 20 A In June 1988, I joined the City as an
 21 assistant director of public utilities. And in
 22 October 1993 my boss resigned. So the City of

1 Falls Church put me in acting director of public
 2 utilities until February, and I was appointed
 3 director of public utilities.
 4 And then in 1997, because the City
 5 merged the Department of Public Works and Public
 6 Utilities, and I was the general manager of the
 7 Department of Environmental Services.
 8 Q And --
 9 A Until 2000. Then I planned to retire in
 10 the next few years. Then I asked the City Manager
 11 to step down to director of public utilities, and
 12 then later engineer of public utilities.
 13 Q Okay. Mr. Nguyen, during the time you
 14 were at the City, did the City hire consultants to
 15 help determine the appropriateness of its water
 16 rates, the returns on equity and its transfers
 17 from the water fund to the general fund?
 18 A Yes.
 19 Q Okay. And what did the City do to
 20 choose the consultants in these matters?
 21 A Normally we sent out the RFP to all the
 22 consultants in the area. And then we formed the

1 panel. And when we received the proposal, the
 2 panel would select at least the top best three for
 3 interview, and then picked the best one.
 4 Q And the City would interview these three
 5 consultants at the panel?
 6 A Yes.
 7 Q And when the City hired -- when the City
 8 picked what you said was the best consultant,
 9 would the City then hire the consultant to do a
 10 report?
 11 A Yes.
 12 Q And would the consultants do reports?
 13 A Yes.
 14 Q And when the City received the reports
 15 from the consultants, what did the City do with
 16 these reports?
 17 A The members of the panel studied the
 18 reports and gave the comments if needed to the
 19 City Manager. And if everything is agreed, then
 20 submit to the City Council for approval.
 21 Q Were recommendations made based upon
 22 these consulting reports?

1 A Yes, sir.
 2 Q Okay. Was one of the consultants hired
 3 by the City named Robert Dolecki from Malcolm
 4 Pirnie?
 5 A Yes.
 6 Q There's some exhibit books in front of
 7 you, and on the far left I believe are the
 8 defendant's exhibits. Can you pull the book for
 9 Exhibit Number 43.
 10 A Yes.
 11 Q Do you see Exhibit Number 43?
 12 A Yes.
 13 Q Is there also a tab for 43-A? Is there
 14 an A tab?
 15 A Yes.
 16 Q Okay. Can you go to 43-A.
 17 A Yes.
 18 Q And this is a document that purports to
 19 be a memorandum dated February 24th, 1984, from
 20 Robert Dolecki regarding a rate of return on the
 21 investments; is that correct?
 22 A Yes.

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1 Q Is this one of the consultant reports
2 that you just testified about?
3 A Yes.
4 Q And did you read and rely upon this
5 document as part of your duties --
6 A Yes.
7 Q -- at the City?
8 And was this document kept in the
9 materials by the City --
10 A Yes.
11 Q -- water system?
12 And did the City use and rely upon this
13 document for issues regarding its water rates and
14 transfers?
15 A Yes.
16 Q Does this exhibit appear to be a true
17 and accurate copy of the consultant's report?
18 A Yes, sir.
19 Q And did the City -- strike that.
20 MR. HOLZHEIMER: Your Honor, I would
21 move Exhibit 43 into evidence, 43-A.
22 THE COURT: Mr. Raphael.

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1 MR. RAPHAEL: Your Honor, I object on
2 the grounds of hearsay. The -- both the public
3 records exception to the hearsay rule and the shop
4 book records exception apply only to records that
5 are prepared by the agency, not to records that
6 are received by the agency from a third party.
7 And I'm anticipating this exhibit being offered
8 among others.
9 I would like to hand up to the Court the
10 case upon which I rely for this. And I have a
11 copy for counsel.
12 THE COURT: All right.
13 MR. RAPHAEL: The case, Your Honor --
14 THE COURT: Yes, sir.
15 MR. RAPHAEL: -- is Frank Shop versus
16 Crown Central Petroleum Corporation, 261 Virginia
17 169, decided in 2001. And in this case, the
18 Supreme Court of Virginia held that it was
19 reversible error for the trial court to admit
20 documentary evidence despite that there was no
21 question as to its authenticity.
22 And if you turn to the second page of

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1 the case, Your Honor, it's highlighted what the
2 evidence was. In this case, it was a form filed
3 by one of the parties with the Virginia Department
4 of Agriculture and Consumer Services. So it was a
5 form submitted to a Virginia state agency.
6 And at trial, you'll see on the right
7 side of page 2, Crown offered this Exhibit 1 into
8 evidence pursuant to the code section 8.01-390.
9 And the court said, at the bottom of page 2 in the
10 right-hand column, that this exception to the
11 hearsay rule for public records does not apply --
12 it applies only if the recording official was
13 reporting facts or events within the personal
14 knowledge and observation of the reporting
15 official.
16 And then when you go on to page 3, the
17 Supreme Court said that it was abundantly clear in
18 this case that the exhibit was not prepared by a
19 public official and does not reflect facts or
20 events within the personal knowledge and
21 observation of the recording official. And so the
22 fact that it was an authentic record didn't

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1 matter. It was still hearsay.
2 And that's exactly what we have here.
3 There are a number of documents that the City of
4 Falls Church has received from various parties or
5 vendors. That doesn't make them -- that doesn't
6 make them the City's official record or the
7 City's -- it doesn't provide an exception to the
8 shop book rule.
9 So it's clearly inadmissible under Frank
10 Shop.
11 THE COURT: All right. Mr. Holzheimer.
12 MR. HOLZHEIMER: Your Honor, the
13 plaintiff's only objection to this exhibit is that
14 it's hearsay. And Your Honor, we're not offering
15 it for hearsay purposes.
16 Under 8.01-390, that is one exception to
17 the hearsay rule. But your Honor, we're offering
18 it for different purposes. We're offering it
19 under the exception for state of mind, and also to
20 explain the City's conduct. Two other reasons
21 that get around the hearsay rule.
22 The Virginia Supreme Court has stated in

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1 State Farm versus Scott that if a statement is
2 offered for purposes other than to prove the truth
3 of the matter asserted, it's not objectionable as
4 hearsay.
5 In Jones versus Commonwealth, 50 Va.
6 App. 437, the Court of Appeals stated, "whether an
7 extrajudicial statement is hearsay depends on the
8 purpose for which it is being offered and received
9 into evidence."
10 Your Honor, the purpose for which we are
11 offering this into evidence is not for hearsay
12 purposes. It is to show the City's state of mind,
13 and also to explain the City's conduct in
14 transferring these funds.
15 In Hodges versus Commonwealth, 272 Va.
16 418, the Supreme Court held that the state of mind
17 exception is one of the established and
18 unquestionable hearsay exceptions.
19 And under Fuller versus Commonwealth,
20 201 Va. 724, the Supreme Court held the hearsay
21 rule does not operate to exclude evidence of a
22 statement, request or message offered for the mere

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1 purpose of explaining or throwing light on the
2 conduct of a person to whom it is being made.
3 Your Honor, that's exactly the reasons
4 we're offering it into evidence. We're not
5 offering it into evidence to anything in these
6 documents are true. We're offering it to explain
7 the City's conduct and explain the City's
8 reasoning and state of mind at the time.
9 THE COURT: But didn't Mr. Nguyen
10 already testify to that, that namely the City
11 chose consultants to advise her as to setting
12 water rates, that they chose the one they
13 considered to be the best. That various
14 recommendations were made. As a result of those
15 recommendations they submitted to the City Council
16 their plan, which was approved.
17 Hasn't he said all of these things
18 without objection from Mr. Raphael. But now he's
19 offering a report. I mean, he can certainly say
20 we received a report from Mr. Dolecki of
21 February 24th, 1984. And this is one of the
22 matters we relied upon in making our

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1 recommendations. That would survive an objection.
2 But the report itself is -- I can't imagine that
3 you're not going to want to submit it and then
4 have Mr. Nguyen go through it and show the things
5 contained in the report with which the City agreed
6 and as a result made a part of her recommendations
7 to the Council.
8 MR. HOLZHEIMER: And, Your Honor, the
9 hearsay exception allows us to admit the
10 statements into court to talk about it. This is
11 the exact example we all learned about in law
12 school, which is somebody runs into a crowded
13 theater and yells "fire." Everybody runs out of
14 the theater in panic. You're allowed to bring
15 somebody on the stand and say, what did that
16 person say? You can say, well, the person got on
17 the stand and yelled something and we relied on
18 that statement and we ran out of there.
19 Your Honor, the hearsay exception says
20 no, you're allowed to say the word "fire." And
21 it's not offered for the truth of the matter
22 asserted. We're not offering it to show whether

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1 or not there was a fire, Your Honor.
2 THE COURT: Why isn't it enough then for
3 Mr. Nguyen to say the recommendations that we made
4 to City Council, which we all know have been
5 approved by the City Council, we can even see from
6 some of the exhibits that the Town discloses how
7 it treats the monies from the utility fund, or,
8 rather, from the water fund. Why can't we just
9 leave it at that?
10 MR. HOLZHEIMER: Because, Your Honor, we
11 have the right to actually get the statement in,
12 as long as it's not being offered for the truth of
13 the matter asserted.
14 The case law is clear. Virginia,
15 McCormick on Evidence, Friend on Evidence, Your
16 Honor, all these cases say you're allowed to get
17 what the statement is and get that into the
18 record.
19 You're allowed to say it was -- the man
20 yelled "fire." Right now we're basically saying a
21 man yelled in, he was very excited and we relied
22 on it. And we thought he was very authoritative

1 in what he was saying, and based on what he was
2 saying, we ran out of the theater.

3 Your Honor, the Supreme Court is clear,
4 you can say and bring into evidence what did the
5 man say. And Mr. Dolecki is the man. And he
6 issued a report. And based on that report, the
7 City had a certain thought as to --

8 THE COURT: Why does that differ from
9 the report from the Virginia Department of
10 Agriculture and Consumer Services that was
11 rejected by the Supreme Court in the Frank Shop
12 case?

13 MR. HOLZHEIMER: Because in that case
14 only, Your Honor, the only basis was under
15 8.01-390. I'm saying, Your Honor, take 8.01-390
16 out of this equation. Under the hearsay
17 exception, if it's offered for state of mind or
18 for -- to explain the City's conduct, it comes in.
19 His case is not on point at all. It only
20 addresses 390.

21 Your Honor, I'm saying put that aside.
22 Look at the Supreme Court cases that I've read to

1 you, the Court, about Hodges and in Fuller. And
2 there it says if you're offering a statement to
3 show the state of mind or explain the City's
4 conduct, the statement comes in. We are allowed
5 to get the word "fire" into evidence.

6 We can get Mr. -- somebody on the stand
7 and say we hired seven consultants and based on
8 what seven people said, you know, we acted
9 accordingly.

10 That's like saying, well, you know,
11 seven people ran into the movie theater and they
12 said something, and one person said this, or one
13 person said something and somebody said something
14 else, and we all ran out of the movie theater.

15 We are allowed to say what did those
16 seven people say. One person yelled "fire."
17 Another person said "the building is falling
18 down." We're allowed to get those statements into
19 evidence.

20 The case that he cited is not on point
21 because it only deals with 390. I'm dealing with
22 the hearsay exceptions for state of mind and to

1 explain conduct.

2 Your Honor, I remember back in law
3 school my professor told me, you know, if you want
4 to know if it's an exception to hearsay and can
5 come in, assume that everything in that report is
6 false. Do you still want it to come in?

7 And, Your Honor, we do. I don't care if
8 anything in this report is absolutely true or
9 everything in it is absolutely false.

10 THE COURT: You mean you don't intend to
11 examine Mr. Nguyen about what's contained in the
12 report?

13 MR. HOLZHEIMER: To the extent that we
14 do, it's not for the truth -- it's not for the
15 truth, if anything in there is true or not. Let's
16 assume it's all false. Let's say it's all false
17 in there. I can examine him on it and say, well,
18 based on these statements, what did the City think
19 its rights were, the City's state of mind.

20 THE COURT: He's testified to that.

21 MR. HOLZHEIMER: He hasn't testified as
22 to what was in this report and what the City did

1 with this report. He's only testified as to his
2 actions.

3 You can say, we ran out of the theater
4 because we thought there was a fire. We're
5 allowed to get the statement "fire" into evidence.
6 Whether it's a statement or a document. The case
7 law is clear.

8 And, Your Honor, the cases that deal
9 with hearsay and the exceptions to hearsay say
10 that a jury can understand the proper purposes
11 that this is being put before. McCormick on
12 Evidence says if you're concerned it's going to be
13 used for improper purposes, you can instruct the
14 jury. That's the proper way to deal with it, that
15 they should not use it for impermissible purposes.
16 But the jury can understand this is offered to
17 be -- only to show what the City's state of mind
18 was and what the City's action was.

19 Here, Your Honor --

20 THE COURT: It's going to go further
21 than that. I have not read the report, obviously,
22 but I cannot imagine something in that report is

1 not going to say Mr. Dolecki holds within his
2 opinion, et cetera, et cetera, that, as the senior
3 project manager for Malcolm Pirnie, that a good
4 way of doing things would include transferring the
5 balances, transferring monies from the water fund
6 to the general fund of Falls Church.

7 And Mr. Raphael cannot cross-examine
8 Mr. Dolecki on that conclusion and confront him
9 with the American Water Works manuals and rules
10 and all of these other things, these other
11 treatises, forms and so forth.

12 MR. HOLZHEIMER: And, Your Honor, that
13 doesn't matter.

14 THE COURT: It matters to Mr. Raphael.

15 MR. HOLZHEIMER: But it could be false.
16 It's like, getting back to the movie theater
17 example. Well, the person who yelled "fire" isn't
18 here for us to cross-examine. We don't know if
19 there was a fire or not. It doesn't matter if
20 there was a fire because we're only getting the
21 statement in.

22 THE COURT: But see, the fire example,

1 what is happening there is that I heard a person
2 yell "fire." And so as a result of that, I ran
3 out of the theater. It doesn't make -- you didn't
4 have to see the fire or see something going on. I
5 heard the person yell "fire." That doesn't mean
6 that there's a fire.

7 Here Mr. Nguyen is saying I made a
8 decision based on this report. And let's take a
9 look at what's in that report, mainly to find out
10 whether there really was a fire.

11 I think that's the basis of the hearsay
12 objection.

13 MR. HOLZHEIMER: Well, Your Honor, but
14 we will never, ever argue that there's any fact in
15 evidence proven by this report. We will never
16 argue that. We think the facts that we're getting
17 into evidence deal with that. And if we ever do,
18 Your Honor, I'm sure Mr. Raphael will stand up and
19 object and say, Your Honor, they're using this
20 report for improper purposes.

21 We won't do that. What we will use the
22 report to do is say, look, is this what the report

1 said? Yes. And based on this report, what did
2 you think on this issue? What did you think on
3 that issue? We will never, Your Honor, argue that
4 a fact in dispute is correct based on this report.

5 And if he does, Mr. Raphael I know will
6 object. And I'll stand up and object, too. I'll
7 say, Your Honor, that's not what we're offering it
8 for, Your Honor. We're offering it to show, and I
9 can go through -- the City can go through and say
10 look, this is what the report said, and we relied
11 on it, and this is what we did. State of mind.
12 This is what we did. Conduct.

13 We will never argue that a fact in
14 dispute is established based on this report. Yes,
15 there are issues in the report that go to
16 different things. But if we never use it for
17 those purposes, then it's not hearsay.

18 And a jury can understand that. You can
19 use -- the fact finder can understand it. You can
20 use it for these other purposes as long as we
21 don't use it for the purpose that Mr. Raphael
22 objects to. And we won't, Your Honor. And I make

1 that proffer to the Court.

2 THE COURT: Well, I know that you would
3 do your best, Mr. Holzheimer. Mr. Raphael.

4 MR. RAPHAEL: Yes, Your Honor. Thank
5 you. Number 1, I think Your Honor already
6 demonstrated the point quite well, that the only
7 reason they want to get into this, after having
8 done the examination so far, is so they can refer
9 to what it says. I think ineluctably they're
10 going to be offering it for the truth of what's in
11 here in terms of how rates are made. So it is
12 clearly hearsay. He hasn't proffered to you what
13 it is in here he wants to point to. But I think
14 it clearly is hearsay.

15 To protect the record on this I also
16 need to point out, Your Honor, we had other
17 objections beside hearsay. I think hearsay is
18 dispositive as to this exhibit. But we also filed
19 objections with regard to foundation and
20 relevance.

21 With regard to relevance, the City's
22 state of mind is not a relevant fact in this case.

1 Because the issue is whether the rates that they
2 set are constitutional or not or are excessive or
3 not. And whether they set the rates in good faith
4 or bad faith, it doesn't matter.

5 THE COURT: Well, I didn't address those
6 points because you did not raise them. It seems
7 to me it's plainly hearsay. I don't see how I can
8 get around it.

9 MR. HOLZHEIMER: Your Honor, on the
10 cross-examine issue.

11 MR. RAPHAEL: May I? Just for the
12 record.

13 THE COURT: Okay. As long as I don't
14 have to decide it, then you --

15 MR. RAPHAEL: We also objected on
16 foundation. And a good example for this one is
17 this witness testified he didn't start at the City
18 until 1988. This document is from 1984. They
19 haven't laid any foundation to get this in through
20 this witness.

21 THE COURT: All right.

22 MR. HOLZHEIMER: Your Honor, on the

1 cross-examination issue, because we're offering it
2 to show the state of mind and also explain the
3 City's conduct, Mr. Raphael is free to
4 cross-examine this witness or any City witness as
5 to issues as to their state of mind, as to issues
6 as to why they did some conduct and they didn't.
7 And he can use anything he wants.

8 Your Honor, we would never cross-examine
9 the drafter of this report, because the substance
10 of what's in this report is not going to be used
11 at issue, Your Honor. We're only going to be
12 using it to explain the City's state of mind. And
13 the trier of fact is able to understand that.

14 THE COURT: But no one is questioning
15 the City's good or bad faith.

16 MR. HOLZHEIMER: Mr. Raphael has.

17 THE COURT: That's what we were talking
18 about yesterday. Whether the rates are reasonable
19 or unreasonable is not an issue. The City could
20 have acted completely in good faith. And I assume
21 she did. The City may have set rates which are
22 completely reasonable. And I think Mr. Raphael

1 grudgingly concedes that, even if they're
2 reasonable, that doesn't change the merits of his
3 constitutional attack.

4 I just -- I just don't see it.

5 MR. HOLZHEIMER: Your Honor, on that
6 issue, Mr. Raphael has made the City's state of
7 mind at issue. He's gotten the statement about
8 the golden goose. He's even argued on his
9 rebuttal to the motion to strike, he put it on the
10 slide, that the City views this as a money making
11 machine, a golden goose. He's going to argue they
12 took \$59 million and they did it because of greed.
13 He has put the City's state of mind at issue.

14 And, Your Honor, we're allowed to put on
15 evidence that our state of mind wasn't we took
16 \$59 million because we viewed it as a money making
17 machine. We took the money because that's what
18 the consultants told us was reasonable.

19 THE COURT: Well --

20 MR. HOLZHEIMER: And if Mr. Raphael will
21 concede that he will not bring up any issues as to
22 motivation, then maybe this issue will resolve.

1 But he's brought it up before, and we have the
2 right to bring evidence to counteract that.

3 THE COURT: I will be very surprised if
4 Mr. Raphael is going to discuss the City's
5 motivation beyond a motivation based upon what's
6 best for the City with regard to the allocation of
7 monies available to serve the residents.

8 I firmly expect that's going to be the
9 heart of his case, not that the City is evil or
10 anything along those lines.

11 The objection to the document marked as
12 Exhibit -- Defendant's Exhibit 43.

13 MR. HOLZHEIMER: 43-A, Your Honor.

14 THE COURT: 43-A is sustained. The
15 document is plainly hearsay. And there's no
16 exception that would permit its admission.
17 Mr. Nguyen is free to testify along the lines as
18 to why they did what they did. But this document
19 cannot be cross-examined.

20 The exception of the City to the Court's
21 ruling is noted.

22 MR. HOLZHEIMER: Thank you, Your Honor.

1 BY MR. HOLZHEIMER:

2 Q Mr. Nguyen, in 1992, did the City hire
3 Mr. Dolecki again to conduct a water rate
4 analysis?

5 A Yes.

6 Q And I would ask that you turn to Exhibit
7 Number 44 in the same book. Is this a copy of
8 Mr. Dolecki's report?

9 A Yes.

10 Q And at the time, did you read, consider,
11 and rely upon this report in your role at the
12 City?

13 A Yes.

14 Q Okay.

15 MR. RAPHAEL: Your Honor, if I may just
16 note for the record an objection to evidence of
17 what consultants said or didn't say. It's not
18 relevant to the issues of whether the current
19 rates are reasonable and whether the City has been
20 engaged in a practice of including a subsidy in
21 the rate that it charges.

22 This document is now from 1992. I just

1 think all of this line of questioning is
2 irrelevant. I don't want to -- I don't want to be
3 deemed to have waived any objection to this,
4 because I think all of this inquiry is irrelevant.

5 THE COURT: All right. The objection
6 will be noted for the record.

7 MR. HOLZHEIMER: Your Honor, for the
8 record, Mr. Raphael has brought in a lot of
9 evidence. We've always argued that the only issue
10 before the Court is the present system.

11 THE COURT: Right.

12 MR. HOLZHEIMER: Mr. Raphael has gone
13 down a history path and has brought in evidence --

14 THE COURT: There hasn't been too much
15 history. I thought it would be helpful. You all
16 know the history of all of these things. I
17 certainly didn't. I did not know the City of
18 Falls Church was the first water company in
19 Fairfax County, amazingly enough. I learned that
20 and many other things as well.

21 MR. RAPHAEL: And just to note, this
22 report is in the same category of the last Dolecki

1 report, so --

2 THE COURT: It hasn't been offered.

3 MR. RAPHAEL: Yes. You're correct.
4 You're correct. Thank you.

5 THE COURT: Yes, sir.

6 BY MR. HOLZHEIMER:

7 Q Mr. Nguyen, did the City rely upon this
8 1992 report from Mr. Dolecki in --

9 MR. RAPHAEL: Objection. Lack of
10 foundation.

11 THE COURT: All right.

12 THE WITNESS: Yes.

13 THE COURT: I was going -- do you have a
14 response to lack of foundation?

15 MR. HOLZHEIMER: Your Honor, I've
16 already established his role at the City.

17 THE COURT: Was he there in '92?

18 MR. HOLZHEIMER: Yes, Your Honor. He
19 was actually there in 1988.

20 THE COURT: Oh, I'm sorry. I thought he
21 said 1998. He was there in '88.

22 MR. RAPHAEL: That's when he started.

1 MR. HOLZHEIMER: He started in '88.
2 This is a '92 report.

3 MR. RAPHAEL: My objection to the
4 foundation is the fact this gentleman is not the
5 City. The City is run by the City Council.
6 There's been no foundation to show what this
7 report was used for, who used it.

8 THE COURT: Well, he's previously
9 testified to that. They hired the experts, they
10 got the recommendations, they submitted it to City
11 Council. I'm going to permit him to testify along
12 those lines. Objection overruled.

13 BY MR. HOLZHEIMER:

14 Q Mr. Nguyen, in 1992, did the City read,
15 use and rely upon this document in determining
16 issues with respect to its water rates?

17 A Yes.

18 MR. RAPHAEL: Objection. Leading.
19 Compound and lack of foundation.

20 THE COURT: Objection overruled. You
21 may answer the question. Please try not to lead
22 in the future.

1 BY MR. HOLZHEIMER:
 2 Q Mr. Nguyen?
 3 A Yes. The City used Mr. Dolecki's
 4 report. And made recommendations to the City
 5 Council.
 6 Q And after the City received this report,
 7 what did the City do with respect to its water
 8 rates and its returns on equity?
 9 A The director of financing worked closely
 10 with this consultant and then recommended the rate
 11 of return --
 12 MR. RAPHAEL: Objection. Hearsay if
 13 he's talking about what the consultant is starting
 14 to recommend.
 15 THE COURT: I didn't understand him to
 16 say that.
 17 Repeat the question, please.
 18 Speak up, Mr. Nguyen, so we can clearly
 19 understand what you're saying.
 20 BY MR. HOLZHEIMER:
 21 Q And after the City received this report,
 22 what did the City do with respect to its water

1 rates and its returns on equity?
 2 MR. RAPHAEL: Same objection.
 3 THE WITNESS: The selected reports would
 4 be studied by the director of finance. And the
 5 director of finance worked closely with the
 6 consultant and submit the proposal to the City
 7 Manager. And the City Manager submit to the City
 8 Council for approval.
 9 MR. HOLZHEIMER: And, Your Honor, for
 10 the record, we would offer Exhibit 44 into
 11 evidence.
 12 THE COURT: And for the same reasons, it
 13 will be refused. And the exception of the City to
 14 the Court's ruling is noted.
 15 MR. HOLZHEIMER: Thank you, Your Honor.
 16 THE COURT: Yes, sir.
 17 BY MR. HOLZHEIMER:
 18 Q Mr. Nguyen, can you turn to tab 45,
 19 please. In 1997, did the City hire Craigie,
 20 Incorporated to conduct a survey of the policies
 21 of the local area cities and counties regarding
 22 the transfer of funds from the water fund to the

1 general fund?
 2 A Yes.
 3 Q And is this report at Exhibit 45 a copy
 4 of the report from Craigie on that issue?
 5 A Yes.
 6 MR. RAPHAEL: Your Honor, may I have a
 7 standing objection to inquiry about consultants on
 8 the ground that it's irrelevant?
 9 THE COURT: Yes, sir.
 10 MR. RAPHAEL: And this doesn't go to the
 11 City's state of mind. The City's state of mind
 12 based on reliance or nonreliance on other
 13 consultants is just not relevant.
 14 THE COURT: Yes, sir.
 15 BY MR. HOLZHEIMER:
 16 Q Mr. Nguyen, let me repeat the question.
 17 Is the document at Exhibit Number 45 a copy of the
 18 Craigie report regarding its survey of the
 19 policies of local area cities and counties
 20 regarding the transfer of funds from its water
 21 fund to their general funds?
 22 A Yes.

1 Q Okay. And back in 1997, did you read,
 2 consider and rely upon this report as the City's
 3 director of public utilities?
 4 A Yes.
 5 Q And did the City use and rely upon this
 6 report in calculating its return on equity and
 7 transfers of the water fund to the general fund?
 8 MR. RAPHAEL: Objection. Lack of
 9 foundation again. He's not linked it up with what
 10 the City did with the report.
 11 THE COURT: I think it's sufficient,
 12 Mr. Raphael. Objection overruled.
 13 THE WITNESS: Actually, this report is
 14 just for information. And we don't use the
 15 proposed rate or fees.
 16 BY MR. HOLZHEIMER:
 17 Q But the City did use it with respect to
 18 determining the transfer amount?
 19 MR. RAPHAEL: Objection. Leading.
 20 MR. HOLZHEIMER: Mr. Nguyen --
 21 THE WITNESS: Yes.
 22 BY MR. HOLZHEIMER:

1 Q Mr. Nguyen, can you turn to -- actually
2 let me not ask you to turn to a particular
3 exhibit. Do you remember in January of 1998 you
4 and your department were asked to look at other
5 Virginia jurisdictions and determine what they
6 were doing with their return on equity on their
7 water system?

8 A Yes. Advised me or asked us to do that.

9 Q And based upon your work, did the City
10 believe that other jurisdictions did take a return
11 on equity?

12 A Yes.

13 MR. RAPHAEL: Your Honor, I have to
14 object to these questions about what the City
15 believed. I've encountered all kinds of
16 resistance when I was trying to offer evidence of
17 what high ranking people said. Now he's asking
18 what this gentleman believed.

19 THE COURT: The City speaks through its
20 resolutions.

21 MR. RAPHAEL: Yes, sir.

22 THE COURT: The objection is sustained.

1 BY MR. HOLZHEIMER:

2 Q Mr. Nguyen, as the director of public
3 utilities, did you believe that other Virginia
4 jurisdictions took a return on equity?

5 A Yes, I did.

6 MR. RAPHAEL: Objection. Lack of
7 foundation.

8 THE COURT: Well, why don't you restate
9 the question. Ask him whether he knew that.

10 BY MR. HOLZHEIMER:

11 Q Based upon the work that you and your
12 department did in surveying other local Virginia
13 cities and counties, did you believe that other
14 Virginia jurisdictions took a return on equity?

15 MR. RAPHAEL: Your Honor, I have to
16 object to this on hearsay grounds. The only basis
17 for this gentleman's belief is what people told
18 him. It's based on hearsay. I have no way to
19 cross-examine that.

20 MR. HOLZHEIMER: Your Honor --

21 THE COURT: But that's -- we've been
22 around this a little bit. I'm going to permit it.

1 I'm going to permit him to answer, not to get into
2 the details but to answer it. Obviously -- I'm
3 going to permit it. Objection overruled.

4 MR. HOLZHEIMER: Thank you, Your Honor.

5 BY MR. HOLZHEIMER:

6 Q And your --

7 A Yes. I believed the other jurisdiction
8 in Virginia, you know, took the return on
9 equities.

10 Q And did you have any understanding as to
11 what jurisdictions did?

12 A We checked with the City of Richmond,
13 Newport News, Norfolk, and Charlottesville. And
14 some others. About a dozen.

15 Q Based upon your work, did the City
16 continue to take a return on equity?

17 A Yes.

18 Q In 1998, did the City hire Robinson,
19 Farmer and Cox to conduct a report on water fund
20 rates and investment return considerations?

21 A Yes.

22 MR. RAPHAEL: And, Your Honor, just is

1 the record clear, Your Honor, that I have a
2 standing objection to this line of questioning
3 about consultants?

4 THE COURT: Yes, sir.

5 MR. RAPHAEL: Thank you, Your Honor.

6 BY MR. HOLZHEIMER:

7 Q Could you please turn to page -- excuse
8 me, tab 46 in the exhibit book.

9 A Yes.

10 Q And is what -- is Exhibit Number 46 a
11 copy of the Robinson Farmer Cox report on water
12 rates and investment return considerations?

13 A Yes.

14 Q And at the time that you were director
15 of public utilities in 1998, did you read,
16 consider and rely upon this report?

17 A Yes.

18 Q Okay. And did the City rely upon this
19 report in calculating its water rates and its
20 return on equities for its water fund transfers to
21 the general fund?

22 MR. RAPHAEL: Objection. Same as

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1 before, Your Honor. Lack of foundation. And no
2 linking up between any City Council ordinance or
3 resolution in this report. The foundation hasn't
4 been laid for the question.
5 MR. HOLZHEIMER: Your Honor, I thought
6 the Court gave him a standing objection on this
7 issue.
8 THE COURT: I'm sorry?
9 MR. HOLZHEIMER: We went through this at
10 the very beginning, Your Honor, as to what the
11 City's procedures were with these reports and what
12 they did with these reports and how
13 recommendations were made.
14 THE COURT: I mean, I wrote down here
15 the City chose consultants, number 1, to advise it
16 with regard to setting water rates. Number 2,
17 recommendations were made. Number 3, these were
18 submitted to the City Council. Number 4, they
19 were approved.
20 If I understand the objection as to this
21 particular document, there's no -- it hasn't been
22 made clear that this was submitted to the Council

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1 and approved. But I assume that's just about to
2 come to make it fit within the paradigm.
3 MR. HOLZHEIMER: Okay.
4 MR. RAPHAEL: And just to be clear, Your
5 Honor, I don't believe the witness testified
6 before that all reports were received, considered
7 and approved and acted on. That was a general
8 question about -- that might apply to some but not
9 all reports. I think he has an obligation to link
10 it up for any particular one that he wants to look
11 at.
12 THE COURT: Well, inasmuch as none of
13 the reports has been admitted yet. But I think
14 it's a fair objection to have Mr. Nguyen make it
15 clear that this was one of the reports that was
16 submitted to the City Council for its approval --
17 for her approval -- for its approval and how the
18 Council acted upon it.
19 BY MR. HOLZHEIMER:
20 Q Okay. Mr. Nguyen, when the City
21 received a copy of this report from Robinson
22 Farmer Cox regarding its water rates and

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1 investment return considerations, what did the
2 City use this report for?
3 MR. RAPHAEL: Objection. Assumes facts
4 not in evidence.
5 THE COURT: Objection overruled.
6 THE WITNESS: The -- we study the
7 report. But I don't recall that we submitted the
8 proposal to the City Council yet.
9 BY MR. HOLZHEIMER:
10 Q Did you rely upon this report?
11 A Well, we discussed about this. But we
12 didn't -- I -- I didn't make any decision on this.
13 Q Do you know if the director of finance
14 relied upon this report?
15 MR. RAPHAEL: Objection.
16 THE WITNESS: Yes.
17 MR. RAPHAEL: Calls for speculation and
18 lacks foundation.
19 THE COURT: Objection sustained.
20 BY MR. HOLZHEIMER:
21 Q Did you work with the director of
22 finance on the City's panels to select consultants

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1 and review the consultant reports?
2 A Yes.
3 Q And did you work with the director of
4 finance in choosing the reports and also in
5 reviewing the reports?
6 A Yes.
7 MR. HOLZHEIMER: Okay. I believe the
8 foundation has been laid, Your Honor.
9 THE COURT: All right.
10 BY MR. HOLZHEIMER:
11 Q And do you know if the director of
12 finance relied upon this report in making
13 recommendations to the City Council?
14 A I don't recall about the decision of the
15 director of finance on this.
16 Q Not the actual decision. But did he use
17 this report and rely upon this report in making
18 his decision?
19 MR. RAPHAEL: Judge, this is an awful
20 lot of leading.
21 THE WITNESS: Yes.
22 THE COURT: I think he answered the

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1 question, Mr. Holzheimer. I think he said he
 2 didn't know.
 3 MR. HOLZHEIMER: Okay. And, Your Honor,
 4 for the record, we would have offered Exhibit
 5 Number 46 into evidence.
 6 THE COURT: Right. And if he had known
 7 and if he had relied upon it, the Court still
 8 would have ruled the same way and held that it was
 9 hearsay, and as a result inadmissible. The
 10 exception of the City is noted.
 11 MR. HOLZHEIMER: Thank you, Your Honor.
 12 THE COURT: Yes, sir.
 13 BY MR. HOLZHEIMER:
 14 Q Mr. Nguyen, can you turn to Exhibit
 15 Number 47.
 16 In 1999, did the City hire the
 17 Government Finance Group to conduct a report on
 18 the water rate systems -- excuse me, on the water
 19 system's capital costs, transfers, water prices
 20 and system value?
 21 MR. RAPHAEL: Same standing objection.
 22 THE COURT: Yes, sir.

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1 THE WITNESS: Yes.
 2 BY MR. HOLZHEIMER:
 3 Q Okay. And was a copy of this report
 4 submitted to the panel regarding the consultants?
 5 A Yes.
 6 Q And did the director of finance use this
 7 report and rely on this report in making
 8 recommendations to the City Council?
 9 MR. RAPHAEL: Objection. Lacks
 10 foundation and calls for speculation.
 11 THE COURT: I think he can answer that
 12 question. Objection overruled.
 13 THE WITNESS: Yes. Director of finance
 14 studied this report.
 15 BY MR. HOLZHEIMER:
 16 Q And did the City use and rely upon this
 17 report in setting its water rates, its return on
 18 investment and its transfers?
 19 MR. RAPHAEL: Objection based on what
 20 the City did in terms of what it relied on. It
 21 calls for speculation as to its motives and
 22 thinking, which has been a consistent objection

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1 from the City in this case.
 2 THE COURT: Well, restate the question,
 3 please.
 4 BY MR. HOLZHEIMER:
 5 Q Was this report used by the City in
 6 determining its return on equity and its transfers
 7 from the water fund to the general fund?
 8 A I think the City didn't use this
 9 report --
 10 Q Okay.
 11 A -- to recommend the equity, the rates.
 12 No, I don't think so.
 13 Q But the director of finance did use this
 14 report and rely upon this report for his duties?
 15 MR. RAPHAEL: Your Honor, objection.
 16 Leading.
 17 THE COURT: Well, even if the director
 18 of finance did, Mr. Nguyen just testified that he
 19 didn't think the City used this report. Well,
 20 there's an objection for a different reason.
 21 MR. RAPHAEL: And relevance.
 22 THE COURT: All right.

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1 MR. HOLZHEIMER: And, Your Honor, for
 2 the record we would have moved this exhibit into
 3 evidence also.
 4 THE COURT: Yes, sir. I understand.
 5 BY MR. HOLZHEIMER:
 6 Q Mr. Nguyen, in connection with the
 7 Government Finance Group's report, did you sign
 8 and issue letters to other Virginia cities and
 9 counties asking for their assistance for a survey
 10 regarding transfers of money from the water fund
 11 to the general fund?
 12 A I did.
 13 Q And did the -- and why did the City do
 14 that?
 15 MR. RAPHAEL: Objection to the extent
 16 he's asking why the City did that. He can ask why
 17 this gentleman did that.
 18 THE COURT: That's what he means to say.
 19 Restate the question, please.
 20 BY MR. HOLZHEIMER:
 21 Q Mr. Nguyen, as the director of public
 22 utilities, why did you do that?

1 A I didn't want to be -- the City to be
2 the only jurisdiction practicing that policy. So
3 I want to verify surrounding jurisdiction, that
4 they are doing the same thing.
5 Q And when you say surrounding
6 jurisdictions, do you mean Virginia jurisdictions?
7 A Yes.
8 Q Mr. Nguyen, there's another set of books
9 there that are marked as Plaintiff's Exhibit. Can
10 you look at Plaintiff's Exhibit Number 19.
11 THE COURT: I'm sorry, Mr. Holzheimer,
12 which exhibit?
13 MR. HOLZHEIMER: It was Plaintiff's
14 Exhibit 19, Your Honor.
15 THE COURT: 10 to 19?
16 MR. HOLZHEIMER: Just number 19.
17 THE COURT: Number 19.
18 MR. HOLZHEIMER: Yes.
19 THE COURT: Thank you.
20 BY MR. HOLZHEIMER:
21 Q Mr. Nguyen, in October of 1999, did the
22 Department of Environmental Services create a

1 briefing book regarding water and sewer?
2 A Yes.
3 Q And is Exhibit Plaintiff's Number 19 the
4 briefing book?
5 A Yes.
6 Q And when you were the general manager of
7 the Department of Environmental Services, did you
8 use this document for questions about the
9 activities and information about the department?
10 A Yes.
11 Q And is this the annual briefing book
12 report that you prepared?
13 A I prepared that for myself.
14 Q Okay. And does it summarize all of the
15 activities of the department?
16 A Exactly.
17 MR. HOLZHEIMER: Your Honor --
18 THE COURT: I must be looking at the
19 wrong exhibit. Is this Defendant's Exhibit 19?
20 MR. HOLZHEIMER: I apologize, Your
21 Honor. No, Plaintiff's Exhibit Number 19.
22 THE COURT: Oh, then I misheard. Let me

1 just get it in front of me.
2 All right.
3 MR. HOLZHEIMER: Your Honor, we would
4 move Exhibit Number 19 into evidence.
5 THE COURT: Any objection?
6 MR. RAPHAEL: Yes, Your Honor. This one
7 was offered and refused before, number 1.
8 Number 2, this document contains a number of the
9 exhibits that have already been rejected as
10 hearsay. For example, at page CITY-FOIA2 3181,
11 it's got the Malcolm Pirnie report. At page
12 CITY-FOIA2 3157, it's got the Robinson Farmer and
13 Cox report. It's got the Government Finance
14 report.
15 So the same rule against hearsay --
16 THE COURT: Wait a minute. Let me back
17 up. Was this offered by Fairfax Water?
18 MR. RAPHAEL: No, Your Honor. It was
19 offered -- it was not. It was offered by Falls
20 Church previously.
21 THE COURT: For which witness?
22 MR. HOLZHEIMER: Your Honor, it was --

1 it was actually offered -- Mr. Raphael offered
2 excerpts from this document in his case in chief.
3 MR. RAPHAEL: That's not correct, Your
4 Honor. And Plaintiff's 19 was -- bear with me a
5 minute.
6 THE COURT: Yes, sir.
7 MR. HOLZHEIMER: And, Your Honor, I want
8 to stand -- I was corrected. Mr. Raphael had an
9 excerpt read from this document in his case in
10 chief. We offered it at the beginning of our case
11 in chief under 8.01-390. The Court ruled it was
12 going to take under advisement whether it would
13 allow it in under 390 and was going to review this
14 document.
15 THE COURT: And I did not rule on it.
16 MR. HOLZHEIMER: And the Court did not
17 rule on it.
18 THE COURT: Right. This is the missing
19 one I haven't yet ruled on.
20 MR. RAPHAEL: That's correct.
21 THE COURT: The CAFRs were all admitted.
22 MR. RAPHAEL: That's correct. And I --

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1 just to clarify. It's true, I referred to one or
2 two pages of this document in my examination of
3 Mr. Tuohy in the deposition.
4 THE COURT: Uh-huh.
5 MR. RAPHAEL: I did not offer this
6 document, the whole briefing book.
7 THE COURT: Uh-huh.
8 MR. RAPHAEL: But it contains many of
9 the documents we just have gone over that the
10 Court has refused on the ground that they're
11 hearsay, including numerous documents received by
12 the City of Falls Church from other parties.
13 So because the City didn't author those
14 documents, they are hearsay. The whole book
15 cannot come in. If they want to address a
16 specific memo in this, we can take that up. But
17 the book itself clearly contains hearsay, as the
18 Court has already ruled, and cannot come in.
19 MR. HOLZHEIMER: And, Your Honor --
20 THE COURT: Yes, sir.
21 MR. HOLZHEIMER: -- Mr. Raphael did have
22 an excerpt of this read into evidence. And he

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1 asked Mr. Tuohy to read it.
2 THE COURT: Which excerpt was it? I'm
3 sure it could not have been from one of the expert
4 reports.
5 MR. RAPHAEL: That's correct.
6 MR. HOLZHEIMER: It was not, Your Honor.
7 It was from one of the memorandum by Mr. Nguyen.
8 But --
9 THE COURT: Right. Right.
10 MR. HOLZHEIMER: But having -- I can't
11 find it in here. But having opened the door and
12 let in one of the documents within this book, Your
13 Honor, we believe he's opened the door. And he
14 has to take the good with the bad.
15 THE COURT: Well --
16 MR. HOLZHEIMER: I mean, there's some
17 things that he liked.
18 THE COURT: Well, there's a door and a
19 door. And that door was not to open up the
20 admission of otherwise inadmissible hearsay
21 evidence.
22 I still want to take a look at this,

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1 because I suspect that there's very little hearsay
2 in this particular document. And I'm going to be
3 inclined to admit it as a record of the City.
4 But I really need to look at it first.
5 And, again, I'll repeat, that doesn't mean I'm
6 going to read all the hearsay, Mr. Raphael, if I
7 bump up against it. But I just want to read it.
8 But it looks to me like a City document
9 that would be properly admitted.
10 MR. RAPHAEL: The same was true in Frank
11 Shop, Your Honor. This document contains numerous
12 documents authored by others.
13 THE COURT: But just let me take a look
14 at it.
15 MR. RAPHAEL: That's fine. And just so
16 the record is clear, if you want to know the pages
17 that I referred to in my examination of Mr. Tuohy,
18 it was CITY-FOIA2 3123 and CITY-FOIA2 3124, which
19 were the minutes of a Utility Committee meeting
20 from May 19th, 1999. I believe that was the only
21 document in this book I referred to. I certainly
22 didn't refer to any of the other items in this

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1 thick report authored by others. Those are
2 clearly hearsay.
3 THE COURT: Well, just let me take a
4 look at them. I mean --
5 MR. RAPHAEL: Yes, sir.
6 THE COURT: -- many of the documents are
7 not hearsay. They're -- they're City of Falls
8 Church, you know, reports and analyses and that
9 sort of thing.
10 MR. RAPHAEL: And just to close the loop
11 on that, many of those documents contain hearsay
12 where somebody would say I called so-and-so and
13 they said.
14 THE COURT: Right. Just let me take a
15 look at it.
16 MR. RAPHAEL: Sure.
17 THE COURT: Okay. I'm just going to
18 reserve on that one. I tend to think it's
19 admissible, frankly. I'm going to reserve on it
20 just for the time being.
21 MR. HOLZHEIMER: Thank you, Your Honor.
22 THE COURT: Is this not a document

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1 that's made available to the public?
2 MR. HOLZHEIMER: This is a document
3 that's part of the City's records regarding its
4 water and sewer reports.
5 THE COURT: They are available to the
6 public?
7 MR. HOLZHEIMER: If somebody would
8 request something under FOIA, we would produce
9 this document to them. And in fact, it was
10 produced -- this was produced as a result of the
11 FOIA, CITY-FOIA number 2.
12 THE COURT: Oh, I see.
13 MR. HOLZHEIMER: This was a FOIA
14 request.
15 MR. RAPHAEL: We FOIA'd it. Any
16 document that a public body has is FOIA-able
17 unless there's an exception.
18 THE COURT: Right. I didn't know if
19 this was distributed. That's why -- for example,
20 there's the commitment to quality. Your exhibit,
21 your rebuttal exhibit. That's handed out, and
22 everybody can read it, and read about the utility

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1 fund going into the general fund, the utility
2 funds being transferred to the general fund.
3 Do you remember that document?
4 MR. RAPHAEL: Yes. The annual --
5 there's an annual report.
6 THE COURT: Yes, sir.
7 MR. RAPHAEL: And then the CAFRs are
8 also on the City's Web site.
9 THE COURT: Right. But I'm talking
10 about the rebuttal exhibit offered by Fairfax
11 Water with regard -- that was issued by the City
12 of Falls Church. It is Plaintiff's Rebuttal 3,
13 Annual Water Report.
14 MR. RAPHAEL: That's right.
15 THE COURT: That's made available to the
16 public. There we are, so forth and so on. That's
17 why I'm asking is this a similar document? More
18 weighty, obviously. But I understand it is not.
19 MR. RAPHAEL: That's correct. This is
20 not on the Web site anywhere.
21 THE COURT: Okay. I'll take a look at
22 it.

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1 MR. HOLZHEIMER: Your Honor, I'm going
2 to go through some more of these consultant
3 reports. I'll try to do them as quickly as
4 possible, Your Honor.
5 THE COURT: I'm sorry?
6 MR. HOLZHEIMER: I'm going to go through
7 some of the other consultant reports, but I'll do
8 them as quickly as possible.
9 THE COURT: All right. That's fine. No
10 problem.
11 BY MR. HOLZHEIMER:
12 Q Mr. Nguyen, can you turn to Defendant's
13 Number 29.
14 Mr. Nguyen, in February of 2000, did the
15 City hire Black & Veatch to provide a report
16 regarding calculation for estimated return for the
17 Falls Church Water system?
18 MR. RAPHAEL: Same standing objection.
19 THE COURT: Yes, sir.
20 THE WITNESS: Yes.
21 BY MR. HOLZHEIMER:
22 Q And is Exhibit 29 a copy of that report?

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1 A Yes.
2 Q And at the time, as general manager of
3 environmental services, did you receive, read,
4 consider and rely upon this report?
5 A This is just for information. And I
6 didn't rely on this report, no.
7 Q Okay. Was this report provided to other
8 people to use and rely in their duties?
9 A I think the consultant just send this to
10 me.
11 Q Was this ever provided to the director
12 of finance?
13 A Yes, I did.
14 Q Okay. Do you know if the director of
15 finance relied upon this report?
16 A No. At that time, Mrs. Hughes, she
17 didn't like this report.
18 MR. HOLZHEIMER: Okay. Your Honor, we
19 would move Exhibit Number 29 into evidence also.
20 THE COURT: All right. It will be
21 refused for the same reason.
22 MR. RAPHAEL: Thank you, Your Honor.

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1 THE COURT: Exception noted.
2 BY MR. HOLZHEIMER:
3 Q Mr. Nguyen, in 2001, did the City hire
4 Camp Dresser and McKee to conduct a water utility
5 rate study and comparative analysis?
6 A Yes.
7 MR. RAPHAEL: Same standing objection.
8 THE COURT: Yes, sir.
9 BY MR. HOLZHEIMER:
10 Q And if you turn to tab number 52, is
11 this a copy of the report from Camp Dresser McKee
12 regarding its water utility rate study and
13 comparative analysis?
14 A Yes.
15 Q And at the time, did you receive a copy
16 of this report and rely upon this report?
17 A At that time, I'm no longer the general
18 manager.
19 Q But you were still the director of
20 public utilities?
21 MR. RAPHAEL: Objection. Leading.
22 BY MR. HOLZHEIMER:

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1 Q What was your position at the time?
2 A Director of public utilities.
3 Q Do you know if anybody at the City
4 reviewed or relied upon this report?
5 MR. RAPHAEL: Objection. Lack of
6 foundation. Calls for speculation.
7 THE COURT: Objection overruled.
8 THE WITNESS: I believe in my role as
9 the general manager at that time, worked closely
10 with the finance director, Mrs. Hughes, at that
11 time.
12 BY MR. HOLZHEIMER:
13 Q And they used this report?
14 A Yes.
15 MR. RAPHAEL: Objection. Leading.
16 BY MR. HOLZHEIMER:
17 Q Did they use this report?
18 A Yes, they did, I believe.
19 Q And at the time, did the City --
20 MR. HOLZHEIMER: Your Honor, at this
21 point we would have moved Exhibit Number 52 into
22 evidence.

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1 THE COURT: All right. And it will be
2 refused. Exception noted.
3 MR. HOLZHEIMER: Okay.
4 BY MR. HOLZHEIMER:
5 Q After Camp Dresser and McKee issued its
6 report, did it conduct a presentation to the City
7 in April of 2001 regarding its findings for its
8 water utility rate study and comparative analysis?
9 A Yes.
10 Q If you turn to Exhibit Number 50. Is
11 this a copy of the presentation by Camp Dresser
12 and McKee?
13 A Yes.
14 Q And at the time, did you -- did you hear
15 the presentation as director of public utilities?
16 A I did not hear their presentation
17 myself.
18 Q Do you know who did hear the
19 presentation?
20 A The general manager of the environmental
21 services, Mr. Samer Beidas at that time.
22 Q And did he rely upon this report in

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1 determining the City's water rates and comparative
2 analysis?
3 A I believe so.
4 MR. RAPHAEL: Objection. Your Honor, I
5 have to object. The City determines the rates,
6 not someone else. And he hasn't established any
7 foundation for that or linked it up.
8 THE COURT: Right. I understand what
9 he's doing.
10 BY MR. HOLZHEIMER:
11 Q Did he?
12 A He did.
13 MR. HOLZHEIMER: Your Honor, we would
14 have offered this into evidence.
15 THE COURT: All right. It will be
16 refused for the same reason. Exception noted.
17 BY MR. HOLZHEIMER:
18 Q Mr. Nguyen, can you turn to Exhibit
19 Number 41 in defendant's exhibit book. Actually,
20 Mr. Nguyen, before you turn there, I want to ask
21 you some different questions.
22 Are you familiar with projects the City

1 of Falls Church did to improve its water system in
2 Fairfax County during your time at the City?

3 A Yes.

4 Q Are you familiar with the project the
5 City did that it called the Tysons Corner
6 improvements?

7 A Yes, I did.

8 Q And can you explain to the Judge what
9 the Tysons Corner improvements were?

10 A The Tysons improvement project includes
11 Tysons Corner new water tank, to upgrade the
12 existing tank from 1.6 million gallons to
13 2.2 million gallons.

14 Q Is this the water tank that's behind
15 Clyde's in Tysons Corner?

16 A Yes. In front of Clyde's restaurant.

17 Q Okay.

18 A And in order to pump the water to that
19 tank, we have to rebuild the Scotts Run pumping.
20 And in order to build that Scotts Run pumping
21 station, we had to stop the water supplies from
22 that pumping station to the Tysons tank. And in

1 order to do that, we asked Fairfax Water to allow
2 us to use their water to pump to the Tysons area.

3 And we had to install -- we didn't
4 install, but we paid for the cost of the
5 installation of the connection of Fairfax County
6 from 42-inch water main to their hospital zone.

7 I worked closely with Mrs. Bain on that
8 project. And we paid about \$700,000 for that job.

9 Q Just for that connection?

10 A That connection alone.

11 Q How much did the Tysons Corner
12 improvements cost in total?

13 A The total including the tank -- the tank
14 alone was \$3 million. Two pumping station, the
15 transmission mains, pressure reducing valve
16 station. All together about \$10 million.

17 Q Okay. And when did construction begin
18 for the Tysons Corner improvements?

19 A The study was done in the late 1990.
20 But the implement of the project started in 2000
21 and completed in 2007.

22 Q And what was the City's reasons for

1 doing these improvements?

2 A The reason to do that improvement is for
3 the fire -- better fire protection, for a little
4 more pressure, 20 psi more, and for future use in
5 case you need more water in Tysons area.

6 Q When you say future use for more water,
7 are you talking about increased demand?

8 A Future use, I meant is that the increase
9 of the density of the same service area. We don't
10 plan to expand the service area at all.

11 Q So the City wasn't looking to expand
12 geographically but was preparing for increased
13 density within its present service area?

14 A Exactly.

15 MR. RAPHAEL: Objection. Leading again.

16 THE COURT: All right. Try not to lead.

17 BY MR. HOLZHEIMER:

18 Q I'm sorry. What was your answer, sir?

19 A Yes.

20 Q If the City was required to run its
21 water system at cost at the time, would the City
22 have done these improvements?

1 A I don't think so.

2 MR. RAPHAEL: Objection. Objection to
3 the form of the question. Lacks foundation.

4 THE COURT: I think it's all right.
5 Objection overruled.

6 MR. RAPHAEL: Also, I have to say I'm
7 going to add to that it calls for speculation what
8 the City Council would have done. He can't say
9 what the City Council would have done.

10 THE COURT: Maybe better lay a little
11 more foundation.

12 BY MR. HOLZHEIMER:

13 Q Mr. Nguyen, during this time were you
14 the director of public utilities and also the
15 general manager of environmental services?

16 A Yes.

17 Q And as part of your duties did you have
18 to deal with improvements and make recommendations
19 as to the reasons for those improvements?

20 A Yes. Actually, every 10 years, we sent
21 out the RFPs and select the consultant for the
22 comprehensive plan of the whole system. And we

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1 base on the report of the consultant to set up the
2 program for capital improvements.
3 Q And at the time, if the City was not
4 allowed to make a profit on its service to Fairfax
5 County customers, would you have made the
6 recommendation to make these improvements?
7 A If we don't receive any benefit, then I
8 don't see any reason to implement those projects.
9 Because the system itself, without the new
10 improvement, still adequate to provide water
11 service to all the customers.
12 Q Are you also familiar with the projects
13 at McLean third level improvement?
14 A Yes.
15 Q And when was that project completed?
16 A It's about 2000, year 2000.
17 Q And what did that project include? What
18 sort of construction?
19 A First of all, we had to shut off the
20 river crossing and go down there and inspect to
21 see whether the river crossing was adequate. And
22 we did that. And the pipe, amazingly, after

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1 40 years, is still in good shape. And after that,
2 we upgrade the main pumping station to increase
3 the pumping from 30 million gallons a day to
4 45 million gallons a day.
5 And we installed about 20,000 -- more
6 than 20, 25,000 transmission main connecting the
7 two legs, Dolley Madison and Kirby Road together,
8 and upgrade the -- another pumping station,
9 Chesterbrook pumping station, to pump for the
10 different pressure zone.
11 Q And --
12 A And all together it costs about
13 \$15 million, Your Honor.
14 Q And why did the City want to increase
15 the capacity of the pumping stations?
16 A That's for future demand.
17 Q Okay. And if the City were required to
18 run its water system at cost, would the City have
19 done this project?
20 A No, we don't need to do that.
21 MR. RAPHAEL: Same lack of foundation,
22 what the City would have done. He can say what he

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1 thought or recommended, but he can't say what the
2 City Council would have done.
3 THE COURT: Well, I think in the
4 position that he held he can provide these
5 answers. I'm going to permit it. Objection
6 overruled.
7 THE WITNESS: We would not have to
8 implement those projects because we don't -- we
9 didn't need. The system, like I said, already
10 adequate.
11 BY MR. HOLZHEIMER:
12 Q Okay. Are you also familiar with the
13 improvements the City did at the Woodford Road
14 water main?
15 A Yes.
16 Q And when was that project completed?
17 A It was in mid-'90.
18 Q The mid-'90s?
19 A Yes. It cost about 70,000 --
20 Q 700?
21 A 700,000, yeah.
22 Q And what was the reason for making those

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1 improvements?
2 A It was for the better flow, better fire
3 protection.
4 Q And would this be for service within
5 Fairfax County?
6 A Yes. All the projects, I would say
7 99 percent is in Fairfax County.
8 Q And all the projects you've testified
9 about already, those were for Fairfax County?
10 A Exactly.
11 Q Okay.
12 A We have only 2.2 square miles of City.
13 And you don't have many facilities, water
14 facilities in the City.
15 Q And with respect to the Woodford Road
16 water main project, if the City was required to
17 run its system at cost, would the City have run
18 this project?
19 A You don't need --
20 MR. RAPHAEL: Same objection.
21 THE COURT: Yes, sir.
22 BY MR. HOLZHEIMER:

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1 Q I'm sorry. What was your answer?
2 A We don't need to do any improvement.
3 The water system was adequate.
4 Q In addition to these projects we've
5 talked about, were there other projects that the
6 City did with respect to its water service in
7 Fairfax County?
8 A Just like I said, all of the projects
9 are in Fairfax County.
10 Q Can you name some of the projects in
11 general for the Court?
12 A The -- all the McLean improvement,
13 Fairfax County, the Chesterbrook area in Fairfax
14 County. The Tysons Corner, Dunn Loring,
15 Merrifield in Fairfax County.
16 Q Was the Lee Highway water line project
17 also in Fairfax County?
18 A In Fairfax County.
19 Q Was the Arlington Boulevard project also
20 in Fairfax County?
21 A Yes.
22 Q And the Haycock Road project?

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1 A Yes. In Fairfax County, too.
2 Q The Arbor Lane booster pump station
3 project?
4 A Yes. That is for fire protection in
5 Fairfax County.
6 Q And the Scotts Run pumping station?
7 A Yes.
8 Q Okay. And without all of these
9 improvements, was the City's water service within
10 Fairfax County adequate before the improvements?
11 A Yes.
12 Q Okay. And how much did all these
13 various improvements cost that we just discussed?
14 A Overall, I would say, since I have been
15 with the City, the cost of the improvements was
16 about \$35 million.
17 Q And at the time, if the City was
18 required to run its water system without a profit,
19 would it have made these improvements?
20 MR. RAPHAEL: Same objection, Your
21 Honor.
22 THE COURT: Yes, sir.

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1 THE WITNESS: I believe the City can't
2 afford to spend that much money for no benefit.
3 BY MR. HOLZHEIMER:
4 Q Can you explain to the Court a little
5 bit about Falls Church's water system in Fairfax
6 County and how it worked and what you thought of
7 it?
8 MR. RAPHAEL: Objection. It calls for a
9 narrative.
10 THE COURT: I'm sorry. What was the
11 question.
12 MR. HOLZHEIMER: I asked for him to
13 describe for the Court as background a little bit
14 about the water system within Fairfax County and
15 how he viewed the system.
16 THE COURT: Describe the background of
17 the Falls Church water system in Fairfax County
18 and what?
19 MR. HOLZHEIMER: And what his opinions
20 were of the system.
21 THE COURT: I'm sorry. I don't
22 understand the last word of what you're saying.

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1 MR. HOLZHEIMER: And what his opinions
2 were of the water system within Fairfax County.
3 THE COURT: Of the Falls Church water
4 system?
5 MR. HOLZHEIMER: Yes, Your Honor.
6 THE COURT: Now, Mr. Raphael.
7 MR. RAPHAEL: My objection is that calls
8 for a narrative, the question there. It's just a
9 narrative. That's not a proper question.
10 THE COURT: What difference does the
11 question make? That was -- the quality of the
12 service or the system, they are not at issue.
13 MR. HOLZHEIMER: Your Honor, I was only
14 offering it to show that the City's system at the
15 time was adequate. That it was -- that these
16 improvements were done to an adequate system
17 because of the necessity for higher demand, higher
18 density.
19 THE COURT: You can ask him that
20 question. You can ask him those questions.
21 MR. HOLZHEIMER: Okay.
22 THE COURT: Ask him those questions, you

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1 know, seriatim. But that would be a better way of
2 doing it, more efficient.
3 MR. HOLZHEIMER: Thank you, Your Honor.
4 I will.
5 THE COURT: Yes, sir.
6 BY MR. HOLZHEIMER:
7 Q Mr. Nguyen, Falls Church's water system
8 in Fairfax County, was it adequate at the time,
9 before any of these improvements were done?
10 MR. RAPHAEL: That's been asked and
11 answered several times, Your Honor.
12 THE COURT: Well, he's just -- that's
13 step number 1 for the rest of the questions.
14 That's all.
15 THE WITNESS: Yes. It was adequate
16 before all the capital improvements.
17 BY MR. HOLZHEIMER:
18 Q And for all these capital improvements
19 you talked about, and some of them we didn't get
20 into detail for, why did the City do these capital
21 improvements?
22 A To have the system more reliable. To --

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1 for better service. For better fire protection.
2 Q Was there -- was the concern of growth
3 an issue for the City in making these
4 improvements?
5 A Can you say it again? I -- the
6 question.
7 Q Sure.
8 A Repeat the question, please.
9 Q Sure. Was future demand a concern for
10 the City in making these improvements?
11 A Yes. Yes.
12 Q And when you talk about future demand,
13 what do you mean by future demand?
14 A The future -- the demand is the increase
15 of density of our service area.
16 Q Okay. Mr. Nguyen, I want to turn your
17 attention to back in 1997, May of 1997. Do you
18 remember receiving correspondence from Fairfax
19 County Water Authority regarding service to its
20 new headquarters?
21 A Yes. I remember that.
22 Q And at the time, did you issue a letter

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1 to the Fairfax County Water Authority offering it
2 service?
3 A Yes, I did.
4 Q And did Fairfax County Water Authority
5 accept?
6 A I believe so.
7 Q Did they give you payment?
8 A Yes.
9 MR. HOLZHEIMER: Thank you, Your Honor.
10 I have no further questions.
11 THE COURT: All right. You're going to
12 have cross-examination?
13 MR. RAPHAEL: I will.
14 THE COURT: Why don't we take just a few
15 minutes.
16 MR. RAPHAEL: Thank you, Your Honor.
17 THE COURT: All right. 5 minutes.
18 (Whereupon, a recess was taken between
19 11:28 a.m. and 11:49 a.m.)
20 THE COURT: All right. Mr. Raphael.
21 Cross-examination.
22 MR. RAPHAEL: Thank you, Your Honor.

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1 THE COURT: Yes, sir.
2 CROSS-EXAMINATION
3 BY MR. RAPHAEL:
4 Q Good morning, Mr. Nguyen.
5 Can you explain what the concept of pay
6 as you go means in the context of the -- of a
7 water utility.
8 MR. HOLZHEIMER: Objection, Your Honor.
9 Beyond the scope.
10 THE COURT: Well, he was the director.
11 I don't think it's an improper question. Besides,
12 he testified specifically as to the need to
13 construct various improvements for the benefit of
14 the system and how those decisions would not have
15 been made unless there were a return on investment
16 to the City.
17 So I think this is within the scope.
18 Objection overruled.
19 BY MR. RAPHAEL:
20 Q Do you remember the question,
21 Mr. Nguyen?
22 A The pay as you go?

1 Q Yeah. What does it mean?
 2 A Meaning if you implement the capital
 3 improvement project, then you pay cash.
 4 Q Right. And the cash you pay is raised
 5 by the fees and rates that you charge to your
 6 customers for the water system, right?
 7 A You have two ways. Either you take the
 8 money from the fees and availability fees, your
 9 local facility fees, to pay that, or you have to
 10 issue bonds, pay for new bonds.
 11 Q Right. And is it true, Mr. Nguyen, that
 12 during the history of the Falls Church water
 13 system, to your -- to the best of your
 14 understanding, the City has tended to fund
 15 improvements on a pay-as-you-go basis through cash
 16 rather than through bonds, correct?
 17 A Yes.
 18 Q Okay. And when it has issued bonds,
 19 those bonds have been repaid from monies from the
 20 water system, correct?
 21 A I believe so.
 22 MR. HOLZHEIMER: Object. Lack of

1 foundation, Your Honor.
 2 THE WITNESS: I believe so. But I
 3 don't --
 4 THE COURT: Objection overruled. He
 5 should be able to answer these questions.
 6 THE WITNESS: I don't work on the
 7 finance.
 8 BY MR. RAPHAEL:
 9 Q Okay.
 10 A So --
 11 Q And --
 12 A -- I don't know much about that.
 13 Q I'm sorry.
 14 Now, Falls Church has operated a water
 15 system in -- outside of its jurisdiction since
 16 before 1950, correct?
 17 A I don't recall the exact year. But I
 18 think it is 1954, '55, something like that.
 19 Q Okay. And you're aware that the
 20 population that is served by the Falls Church
 21 Water system is comprised by about 92 percent of
 22 customers who live in Fairfax County, right?

1 A Yes.
 2 Q So -- and that's been true, has it not,
 3 that Fairfax County customers have comprised the
 4 vast majority of the City's water customers since
 5 the 1950s.
 6 A Yes.
 7 Q Okay. And so most of the money that the
 8 City raises from commodity charges come from
 9 Fairfax County ratepayers, right?
 10 A Well, but the -- I recall that the fees,
 11 the collection of the fees, availability fees,
 12 local facility fees happened in 1972.
 13 Q Yes.
 14 A So --
 15 Q And those availability fees are charged
 16 to new customers --
 17 A Yes.
 18 Q -- wherever they want to connect in the
 19 system, correct?
 20 A For the new customers only.
 21 Q Right. And have there tended to be more
 22 new customers in Fairfax County or in Falls

1 Church?
 2 A Just like I said, 92 -- 99 percent of
 3 the water system improvement is in Fairfax County.
 4 Q Right. So most of the availability
 5 fees, then, since 1972 have actually been paid by
 6 Fairfax County customers, right?
 7 A Yeah. Fairfax County new customers.
 8 Q Yes. And the purpose of that is to buy
 9 into the system, right?
 10 A The purpose of that is for the capital
 11 improvement.
 12 Q Right.
 13 A The financing of the big projects.
 14 Q In order to make the water available to
 15 new customers. That's why it's called an
 16 availability fee, right?
 17 A Yes.
 18 Q Okay.
 19 A Availability fee is for that.
 20 Q All right. And the availability fee is
 21 computed on a different basis, is it not, from the
 22 commodity charge?

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1 A It's completely different.
 2 Q It is completely different. That's
 3 exactly right.
 4 Now, when -- at the time that you headed
 5 the water system in Falls Church, am I correct
 6 that you belonged to the American Water Works
 7 Association?
 8 A I'm a member of that. Until I retire.
 9 Q You're still a member.
 10 A No, no. I can't afford to be --
 11 Q All right. I'm sorry, you were a member
 12 until --
 13 A Yes.
 14 Q -- you were a member of AWWA until you
 15 retired.
 16 A I dropped all kind of memberships.
 17 Q All right. And would you agree with me
 18 that anyone who works in the water industry should
 19 know the AWWA's M1 manual?
 20 A Yes.
 21 MR. HOLZHEIMER: Objection, Your Honor.
 22 THE WITNESS: They should.

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1 THE COURT: Sir?
 2 MR. HOLZHEIMER: Objection, Your Honor.
 3 Lack of foundation. Calls for speculation.
 4 THE COURT: Well, he's a member of the
 5 AWWA.
 6 MR. HOLZHEIMER: But he's asking that he
 7 speculate and offer an opinion as to everybody in
 8 the water industry, whether or not they should
 9 join.
 10 THE COURT: Well, why don't you rephrase
 11 that question.
 12 BY MR. RAPHAEL:
 13 Q You are familiar with the M1 manual,
 14 correct?
 15 A Yes, sir.
 16 Q And you believe that that is a leading
 17 industry source, right?
 18 A Yes.
 19 Q And when I asked you the question in
 20 your deposition about whether anyone in the
 21 industry should know the M1 manual, you agreed
 22 that that was true, didn't you?

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1 A Yes.
 2 MR. HOLZHEIMER: Objection, Your Honor.
 3 He's asking for -- offering an inconsistent
 4 statement. There's been no inconsistent
 5 statement.
 6 THE COURT: Objection overruled.
 7 BY MR. RAPHAEL:
 8 Q Now, despite your knowledge of the
 9 M1 manual, Mr. Nguyen, you would not consider
 10 yourself an expert in utility rate making,
 11 correct?
 12 A I'm not expert because we have a finance
 13 director. We have the, you know, finance
 14 department.
 15 Q Right.
 16 A So I'm --
 17 Q You don't claim expertise in rate
 18 making, do you?
 19 A No.
 20 Q Okay. And even though you're not an
 21 expert in utility rate setting, am I correct that
 22 you understand that there's a difference between,

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1 number 1, how you calculated rate of return for
 2 purposes of setting the water rate, on the one
 3 hand, and, number 2, whether you take that money
 4 and transfer it out of the water system into the
 5 general fund?
 6 You recognize that distinction, correct?
 7 A Yes. But not clearly.
 8 Q All right. Do you remember when I asked
 9 you that question in your deposition:
 10 "Question:" -- this is page 99,
 11 line 8 -- "Do you understand that there are
 12 different questions presented by, number 1, how
 13 you calculate the rate of return and, number 2,
 14 whether you take that money and transfer it out of
 15 the water fund to the general fund? Do you
 16 recognize those as separate questions?
 17 "Answer: Yes."
 18 A Yes. Right.
 19 Q All right. That was your testimony,
 20 correct?
 21 A Right.
 22 Q Now, during the time that you oversaw

1 the water system for Falls Church, am I correct
2 that the City had a practice of transferring
3 money, which it called a return on equity, from
4 the water system to the general fund?

5 A I don't understand clearly your
6 question.

7 Q Okay. I'm sorry. I'll try to slow down
8 a little bit.

9 During the time that you oversaw the
10 water system for the City of Falls Church, isn't
11 it true that the City had a practice of
12 transferring money from the water fund to the
13 general fund, calling it a return on equity?

14 A Yes.

15 Q Okay. And during the time that you ran
16 the water system, you were aware that money from
17 the water fund was being used to help balance the
18 City's budget?

19 A I have no idea. I didn't work on the,
20 you know, the City's budget overall.

21 Q Okay. But do you remember when I asked
22 you that question in your deposition, page 170,

1 line 12?

2 "Question: Were you aware at the time
3 you worked and ran the water system, that money
4 from the water fund was being used to help balance
5 the City's budget?

6 "Answer: Yes."

7 A I thought I misunderstood about the
8 department budget now instead of the overall
9 City's budget.

10 Q Okay. You were given an opportunity to
11 correct your deposition, were you not?

12 A I didn't know that. I'm sorry.

13 Q All right. You didn't make any
14 corrections to your deposition, did you?

15 A No, I didn't.

16 Q Mr. Sapp, can we bring up, please -- I'm
17 sorry, Mr. Nguyen, my friend here is Ken Sapp.
18 And I may refer to him as Mr. Sapp or Ken from
19 time to time.

20 Mr. Sapp, would you bring up Plaintiff's
21 Exhibit 3.6, please.

22 Mr. Nguyen, have you seen this exhibit

1 before?

2 A Yes.

3 Q Okay. Now, this exhibit has been
4 admitted into evidence. And it reflects the
5 percentage of the return on investment from the
6 water fund to the general fund as a percentage of
7 the water fund's operating revenues.

8 Do you see that?

9 A Yes.

10 Q All right. And am I correct,
11 Mr. Nguyen, that, during the time that you served
12 as the general manager of environmental services,
13 the ROI or ROE was under 20 percent?

14 A One year is about 25 percent, 2000.

15 Q When did you leave the position?

16 A 2000.

17 Q In 2000?

18 A Uh-huh.

19 Q All right. In fiscal year -- these are
20 for fiscal years now. So in fiscal year 2000 --

21 A Yeah, I mean 1999.

22 Q You left in '99?

1 A I stepped down.

2 Q You stepped down in 1999.

3 A Yes.

4 Q Okay. So for fiscal year 1999, the
5 return on equity was under 20 percent, correct?

6 A Yes.

7 Q All right. And am I correct,
8 Mr. Nguyen, that at the time you served as the
9 general manager of environmental services, you
10 believed that a percentage of ROI of 38 percent or
11 more was too high to be taken?

12 A That's my personal thought. But the
13 decision of how much is not in my department.

14 Q Right. It wasn't your decision, but you
15 thought 38 percent would be too high, correct?

16 MR. HOLZHEIMER: Objection, Your Honor.
17 Asked and answered.

18 THE WITNESS: I believe so.

19 THE COURT: That's all right.

20 BY MR. RAPHAEL:

21 Q Okay. In fact, Mr. Nguyen, isn't it

22 true that you thought a return on equity as high

1 as 39 percent of operating revenues would be
2 absolutely outrageous?

3 A If the return on equity is too high,
4 then the cost of the operation would be high.

5 Q My question, sir, was, isn't it true
6 that you thought a return on equity of 39 percent
7 would be absolutely outrageous? Your words.

8 A Yeah. I think so.

9 Q Okay. Around 1999 or 2000, the City
10 Manager for Falls Church was Hector Rivera,
11 correct?

12 A Yes.

13 Q And you became aware that Mr. Rivera
14 wanted to transfer as much as 60 percent of the
15 operating revenues of the water system to the
16 general fund as a return on investment, correct?

17 A I don't recall what the percentage.

18 Q All right.

19 A He worked very closely with the finance
20 director, not with me.

21 Q Do you remember when I asked you that
22 question in your deposition, page 240, line 3:

1 "Question: Do you recall that the City
2 Manager Rivera, that he wanted to transfer
3 60 percent of the water system revenues to the
4 general fund?

5 "Answer: Yes."

6 MR. HOLZHEIMER: Objection, Your Honor.
7 Relevance.

8 THE COURT: Objection overruled.

9 THE WITNESS: Yes.

10 BY MR. RAPHAEL:

11 Q All right. That was your testimony,
12 right?

13 A Right.

14 Q And you thought that 60 percent was way
15 too much, correct?

16 A Yes. But I was not the decision-maker.

17 Q Right. It wasn't your decision?

18 A No.

19 Q Right. And am I correct, sir, as of
20 1999, when the return on equity was still under
21 20 percent of operating revenues, even at that
22 time you believed that the water system was a

1 money-making machine?

2 A Well, the reason I mentioned about the
3 golden goose, money-making machine is not because
4 we got the free system and we just sat there and
5 waiting for the money coming in. That's not the
6 point.

7 What I meant is the City owns a very
8 well-designed system. The beauty of the system
9 is, if you have a power shutdown at the Washington
10 Aqueduct, it doesn't matter, you can get water
11 from McMillan Treatment Plant. So you still have
12 water.

13 If you have a power outage at our main
14 pumping station, you still okay. You go
15 Washington Aqueduct to switch you from second
16 level to third level with high pressure. Then you
17 bypass the main pumping station.

18 In year 2000, Y2K, we installed the
19 backup generators just in case if something
20 happened to the computers, blackout the City. And
21 we still have the power to supply water.

22 And Y2K, we didn't have any problem.

1 Nothing happened.

2 Q Mr. Nguyen, that wasn't my question,
3 sir.

4 My question was, isn't true that at the
5 time you were at the City --

6 A Well --

7 Q Excuse me, Mr. Nguyen. You need to let
8 me finish my question, and I'll let you finish
9 your answer, okay.

10 At the time that you were the general
11 manager for City in 1999, you considered the water
12 system a money-making machine. Yes or no?

13 A Just as I said, the system is not easy
14 money-making. It's not easy money. The City
15 spent a lot of money and effort to build the
16 system.

17 Q I understand that. But, again, sir,
18 that's not my question.

19 MR. HOLZHEIMER: Mr. Raphael, please let
20 him explain his answer as you requested.

21 THE COURT: I'm sorry.

22 MR. HOLZHEIMER: Mr. Raphael asked him

1 and he's explaining, and I don't think it's
 2 appropriate for Mr. Raphael to interrupt him.
 3 THE WITNESS: Yeah. I tried to answer
 4 your question.
 5 MR. RAPHAEL: With all due respect, he's
 6 not answering the question.
 7 THE COURT: Well, he's entitled
 8 initially to a yes or no. And if he wishes a
 9 further explanation, he can obtain it. If he
 10 doesn't, then you can do that yourself.
 11 Mr. Holzheimer.
 12 MR. HOLZHEIMER: Yes, Your Honor.
 13 THE COURT: Objection overruled.
 14 Restate the question. Just listen to
 15 the question and answer it. If you need to
 16 explain something, Mr. Holzheimer will give you
 17 that opportunity. Don't you worry.
 18 THE WITNESS: Thank you, Your Honor.
 19 THE COURT: Yes, sir.
 20 BY MR. RAPHAEL:
 21 Q Mr. Nguyen, my question is, isn't it
 22 true that when you were the general manager for

1 the City of Falls Church with supervision over the
 2 water system in 1999, you believed that the water
 3 system at that time was a money-making machine?
 4 Yes or no.
 5 A No. I didn't mean exactly the -- maybe
 6 I used the wrong term, you know.
 7 Q You used the term "money-making
 8 machine," did you not?
 9 A Well, it was -- at that time, I -- I put
 10 that in my folder. It was a personal note for
 11 myself.
 12 Q Right.
 13 A I didn't tell anybody about that.
 14 Q My question is, you called or considered
 15 the Falls Church system a money-making machine,
 16 right?
 17 MR. HOLZHEIMER: Your Honor, asked and
 18 answered. He said no.
 19 THE WITNESS: No, I --
 20 THE COURT: I'm not sure. Objection
 21 overruled.
 22 THE WITNESS: I -- I didn't mean exactly

1 what I said.
 2 BY MR. RAPHAEL:
 3 Q All right. Why don't we show you what
 4 you wrote.
 5 Mr. Sapp, please, would you bring up
 6 Plaintiff's 19 at page 39 of 286.
 7 Okay. Mr. Sapp, show the prior page.
 8 All right. Mr. Nguyen, you recognize
 9 this, do you not, as the minutes of the Utility
 10 Committee meeting from May 19th, 1999?
 11 A Yes.
 12 Q And you prepared this document, did you
 13 not?
 14 A I did.
 15 Q All right. If we could, now, Mr. Sapp,
 16 turn the page, please. And, for the record, I'm
 17 showing you CITY-FOIA2 003124.
 18 Mr. Sapp, would you highlight
 19 paragraph 4 and all three bullets -- paragraphed
 20 numbered 4 and all three bullets below it. All
 21 right.
 22 Mr. Sapp, would you please highlight the

1 third bullet.
 2 Okay. This memorandum reflects your
 3 recommendations concerning whether to sell the
 4 water system, right?
 5 A Yes.
 6 Q And you believed that selling the water
 7 system would not be profitable to the City,
 8 correct?
 9 A Yes.
 10 Q And the reason you believed it would not
 11 be profitable was because the City would lose
 12 significant revenue that it was making in the form
 13 of the transfer from the water fund to the general
 14 fund as a return on equity, right?
 15 A Yes.
 16 Q And do you see where you wrote in this
 17 note: You will lose the money-making machine (the
 18 goose) forever?
 19 A Yes.
 20 Q You wrote that, right?
 21 A Yes.
 22 Q So you called, in your note, the City's

1 water system a money-making machine, right?

2 A Yes.

3 Q And your reference to the goose was a
4 reference to the goose that laid the golden egg,
5 correct?

6 A Yes.

7 Q Okay. Now, this was in 1999. Are you
8 aware that the return on equity significantly went
9 up after 1999 as a percentage of operating
10 revenue?

11 A Yes.

12 Q And with regard to these recommendations
13 that we are seeing here at Bates page CITY-FOIA2
14 3124, you actually presented these recommendations
15 to the City Council, didn't you?

16 A Well, actually, I brought the memo to --
17 for myself to discuss during the meeting with the
18 utilities committee.

19 Q And you presented -- I'm sorry.

20 A And I talked to the City Manager. But
21 it didn't go to the City Council.

22 Q All right. Well, do you remember when I

1 asked you this question in your deposition at
2 page 153, line 20:

3 "Question: We were looking at your
4 document that you prepared in connection with the
5 Utility Committee meeting, Wednesday May 19, 1999.
6 It's got the Bates number CITY-FOIA2 3123.

7 My question was: "Did you present your
8 views that are outlined here to the Utility
9 Committee meeting on that date?"

10 "Answer: Yes."

11 A Yes.

12 Q Okay. And the views we're talking about
13 are the views that are set out in this memorandum,
14 right?

15 A I don't think there's a memo sent to
16 anybody.

17 Q That wasn't my question. My question
18 was the views that are -- that you articulated in
19 this memo --

20 A Yes.

21 Q -- were views that you presented to the
22 Utility Committee, right?

1 A Yes.

2 Q And the Utility Committee is a committee
3 of the City Council, is it not? Or at least it
4 was at that time?

5 A I believe it has one or two council
6 member, but not the whole City Council.

7 Q Yes. It's a subcommittee of the City
8 Council, right?

9 A Sort of.

10 Q Okay. Mr. Holzheimer asked you some
11 questions about the various reports that the City
12 had solicited during the time you were working at
13 the City. And you testified about those on direct
14 examination.

15 Do you remember that? Do you remember
16 Mr. Holzheimer's questions to you about those
17 reports?

18 A Yes.

19 Q And you talked about your discussions
20 with others at the City about, for example, what
21 the return on equity should be, right?

22 A We got the information from other --

1 Q Yes.

2 A -- jurisdiction, but we --

3 Q All right.

4 A -- didn't discuss with them.

5 Q Right. But do you remember when I asked
6 you that question in your deposition, if you had
7 ever discussed with your colleagues at the City
8 what the return on equity should be, and you said
9 you never did?

10 A I didn't discuss with other people in
11 the City.

12 Q So you never discussed with anyone at
13 the City what you thought --

14 A Except my --

15 Q You need to let me finish the question.

16 You never discussed with anyone at the
17 City what you thought the return on equity should
18 be?

19 A I never did. I don't recall I discussed
20 with anybody else, no.

21 Q And did you have -- you also told me
22 that you had no input in determining what the

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1 return on equity should be.
 2 Is that a true statement?
 3 A I didn't have any input on the final
 4 decision how much, you know, the return on equity.
 5 That is between the director of finance and the
 6 City Manager.
 7 Q And you weren't privy to those
 8 discussions, were you?
 9 A No.
 10 Q All right. So you don't know what the
 11 basis was upon which they decided what the return
 12 on equity should be?
 13 A Well, the basis, the basis, based on the
 14 study of the selected consultant. But I didn't
 15 work on details. I didn't have a chance to.
 16 Q I'm sorry. I'm confused now.
 17 You told me that you never discussed
 18 with your colleagues at the City what you thought
 19 the return on equity should be, right?
 20 A Right.
 21 Q And you also told me you had no input in
 22 determining what the return on equity should be,

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1 right?
 2 A Right.
 3 Q And you were not privy to the
 4 discussions between the finance director and the
 5 City Council about what the return on equity
 6 should be.
 7 Is that right, too?
 8 A Right.
 9 Q Mr. Holzheimer asked you about the
 10 Robinson, Farmer and Cox report and the Government
 11 Finance Group report. And those reports came
 12 before the CDM report that he also asked you
 13 about.
 14 Am I correct, Mr. Nguyen, that you told
 15 CDM that the reason you wanted them to do a rate
 16 study was because you didn't agree with the
 17 Government Finance Group report or the Robinson,
 18 Farmer and Cox report?
 19 A I actually, the whole staff, the finance
 20 department and myself, we need more information.
 21 We need more -- we want more input from the
 22 consultant that we -- we asked them --

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1 Q That wasn't my question, Mr. Nguyen.
 2 My question was, isn't it true that you
 3 told CDM that the reason you wanted a new rate
 4 study was because the City didn't agree with the
 5 Government Finance Group report or the Robinson,
 6 Farmer and Cox report?
 7 A Yes.
 8 Q Mr. Holzheimer also asked you some
 9 questions about a survey that you did to determine
 10 what other jurisdictions were doing with regard to
 11 a return on equity.
 12 Do you remember that line of
 13 questioning?
 14 A Yes.
 15 Q And with regard to the entities that you
 16 looked at as to whether they took a return on
 17 equity or not, am I correct that you didn't
 18 determine or figure out whether the return was
 19 based on a return on equity and their rate making
 20 or whether they actually transferred money from
 21 the water fund to the general fund?
 22 Isn't that true?

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1 A Well, I make -- my staff make the table
 2 with the operation cost and, you know, for the
 3 percentage of the transfer.
 4 Q Right. And my question was, isn't it
 5 true that you didn't determine whether the return
 6 on equity was built into the rate and kept in the
 7 water system on the one hand or whether money was
 8 actually transferred out of the water fund into
 9 the general fund on the other?
 10 You didn't determine that, did you?
 11 A I didn't.
 12 Q And to the best of your knowledge, no
 13 one on your staff determined that either, did
 14 they?
 15 A They just took the two figures, and we
 16 take the percentage based on the budget and the
 17 return on equity.
 18 Q Right. And -- but that didn't indicate
 19 whether any money was being taken out of the water
 20 system and diverted to the general fund, correct?
 21 A Well, this is the money transferred from
 22 the utilities on the water fund to general fund,

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1 the amount they provided us.

2 Q But that's not what you told me when I

3 took your deposition, sir.

4 Do you remember this question at

5 page 128:

6 "Question: Now, with regard to the

7 entities that are listed in the table, we talked

8 earlier about the distinction between computing a

9 return on equity on the one hand and then taking

10 that money and transferring it to the general fund

11 on the other. With regard to the entities that

12 are set out in the table here, do you know whether

13 they did both? Did all of those entities, in

14 other words, transfer money as a return on equity

15 to the general fund?

16 "Answer: I don't know."

17 That was true testimony when you gave

18 it, wasn't it?

19 A I don't know the detail of the transfer.

20 Q Right.

21 A The percentage of those things. How

22 they compute, I didn't know.

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1 Q And you also don't know whether they

2 transferred money from the water fund to the

3 general fund. Isn't that true?

4 A I believe the amount they gave us, they

5 provided us is the amount of the water fund to the

6 general fund.

7 Q Okay. But that's not what you told me

8 when I took your deposition.

9 So are you changing your testimony now?

10 A No. No. I'm not changing. But too

11 many questions in my head.

12 Q You testified about various projects

13 that the City of Falls Church undertook to provide

14 water service in Fairfax County. One of the

15 reasons you said those projects was undertaken was

16 for fire protection.

17 What does "fire protection" mean? What

18 did you mean by that?

19 A You know the requirement of fire code,

20 how many gallons per minute, you know, is set up

21 sometimes 2500 gallons per minute, you know. And

22 in order to have that flow, we need to improve the

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1 water system so that you can have a higher flow.

2 Q So the existing system had inadequate

3 fire flow, correct?

4 A No. The system is adequate.

5 Q Well, then why did you need to increase

6 it for fire protection purposes?

7 A We want to have it better. That's all.

8 Q What is the minimum requirement for fire

9 flow?

10 A It varies. It depends on the location.

11 Q Okay. Give me some examples.

12 A Well, it varies from 1,000 to

13 3,000 gallons per minute. It depends on the

14 location.

15 And I'm not expert on the fire

16 protection.

17 Q All right. And what projects were

18 undertaken to improve fire flow?

19 A Everywhere. If you improve the size of

20 the pipe, the height of the tank, then you improve

21 the fire protection.

22 Q Okay. And as a result of the Tysons

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1 Corner improvements, what was the change in the

2 fire flow pressure?

3 A You talk about 20 psi more everywhere.

4 Q What was it before?

5 A You know, the pressure to meet the

6 requirement is -- varies from 20 psi to 80 psi.

7 Anything below 20 psi is not acceptable.

8 Q Okay.

9 A Anything above 80 psi is too much. You

10 need to install the PRV.

11 Q Okay. So am I correct that all of the

12 projects that you testified about on direct, at

13 least one purpose was to improve fire flow?

14 A Improve the service.

15 Q Improve fire flow.

16 A Improve fire flow, too.

17 Q I want to take them one at a time.

18 But fire flow was a purpose that was

19 served by all of the projects that you testified

20 about on direct, correct?

21 A Yes.

22 Q And then you also talked about the need

1 to increase pressure.
 2 Before the improvements were made that
 3 you talked about on direct examination, isn't it
 4 true that the City of Falls Church received a
 5 number of complaints from customers about
 6 inadequate water pressure?
 7 A Well, any water system you receive that
 8 kind of complaint.
 9 Q That isn't my question.
 10 I'm saying, isn't it true that the City
 11 received a number of complaints from a number of
 12 customers about inadequate water pressure?
 13 A Here, there, yes.
 14 Q And after the improvements were
 15 completed, the number of complaints went down,
 16 didn't it?
 17 A Any improvement, you reduce the
 18 complaints.
 19 Q Okay. That wasn't my question either.
 20 My question was, after the City's
 21 improvements were completed, the number of
 22 complaints about water pressure went down; isn't

1 that right?
 2 A Yes.
 3 Q All right. And there's still some
 4 areas, are there not, in Fairfax County where the
 5 water pressure is -- where you receive complaints
 6 from customers about inadequate water pressure,
 7 right?
 8 A You say it again.
 9 Q Isn't it true that there are still some
 10 areas in Fairfax County where the City provides
 11 water service where the City still receives
 12 complaints about inadequate water pressure?
 13 A It depends on when. In the summer, for
 14 example, you have a hot summer, hot summer, then,
 15 you know, the peak use is higher, then you have
 16 low pressure.
 17 Q Okay. And the funds that were used to
 18 pay for the systems improvements that you talked
 19 about, like Tysons Corner and McLean third level
 20 improvement, the Woodford Road water main -- let's
 21 start with Tysons Corner, how is the Tysons Corner
 22 improvement funded?

1 A We have the -- we have the money in the
 2 reserve fund for the water improvement project.
 3 And we use that money.
 4 MR. HOLZHEIMER: I would object to lack
 5 of foundation.
 6 THE WITNESS: And then actually --
 7 THE COURT: Okay. Hang on, hang on,
 8 Mr. Nguyen.
 9 Please restate the question.
 10 MR. RAPHAEL: My question is, how are
 11 the improvements for the Tysons Corner pumping
 12 station funded?
 13 He testified about that on direct
 14 examination.
 15 MR. HOLZHEIMER: And, Your Honor, with
 16 respect to funding, he's testified also that he
 17 didn't deal with it. That was the finance
 18 director. I don't believe there's a proper
 19 foundation.
 20 THE COURT: I still think that's within
 21 his purview. I'm going to permit him to answer.
 22 Objection overruled.

1 THE WITNESS: We have a budget prepared
 2 for the operations and also for the capital
 3 improvement project.
 4 And every year, the City Council
 5 approves that and set aside the funds for capital
 6 improvement projects. And we have the money and
 7 we sent out for bid, and we pay the project with
 8 money.
 9 BY MR. RAPHAEL:
 10 Q Okay. And was that done as a
 11 pay-as-you-go?
 12 A Yes. So far.
 13 Q All right. No bond monies were raised
 14 for the Tysons Corner project, right?
 15 A I have no idea lately.
 16 Q You don't know.
 17 A I don't know.
 18 Q All right.
 19 A The director of finance have more
 20 knowledge on that.
 21 Q Okay. Were you involved in the
 22 decisions concerning how to pay for the Tysons

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1 Corner improvements?
2 A Is there --
3 MR. HOLZHEIMER: I believe he's
4 testified he doesn't know.
5 THE WITNESS: I don't --
6 THE COURT: Well, ask a different
7 question.
8 THE WITNESS: I'm no longer with the --
9 I'm no longer handle -- handling the department.
10 So....
11 BY MR. RAPHAEL:
12 Q Well, I know you're no longer handling
13 the department, but my question was different from
14 that.
15 It was, were you ever involved in the
16 decisions concerning how to fund the Tysons Corner
17 improvements?
18 A No. Actually the director of finance
19 and the City Manager.
20 Q All right. And were you privy to their
21 discussions about how they plan to fund the Tysons
22 Corner improvements?

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1 A No.
2 Q All right. Let's talk about the McLean
3 third level improvements, which you said were
4 completed in 2000.
5 How did the City pay for the McLean
6 third level improvements?
7 A Again, pay as you go.
8 Q All right. Where most of the money
9 comes from the Fairfax County ratepayers, right?
10 A Well, we --
11 MR. HOLZHEIMER: Objection. Foundation.
12 THE WITNESS: I --
13 THE COURT: Well, I'm sure Mr. Raphael
14 is going to say the foundation is -- well, perhaps
15 not.
16 MR. RAPHAEL: The gentleman testified on
17 direct examination about what would have happened
18 with these projects had they been funded one way
19 or another. And I'm trying to establish what his
20 role was in those decisions.
21 I don't think he had one. I'm trying to
22 get there.

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1 THE COURT: I think the question is
2 proper. I was thinking of something different
3 with regard to improvements and the two aspects of
4 that. The none of the rest of the customers and
5 the availability fees.
6 I think it's proper. Objection
7 overruled. Go ahead.
8 MR. RAPHAEL: Could you read the
9 question, please.
10 THE WITNESS: I don't know the source
11 of --
12 MR. RAPHAEL: Just one second.
13 (The reporter read the record as
14 requested.)
15 THE WITNESS: I have no idea about the
16 source of the income.
17 BY MR. RAPHAEL:
18 Q All right. Were you involved -- were
19 you privy to the discussions with the finance
20 director concerning how to pay for the McLean
21 third level improvements?
22 A Pay as you go.

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1 Q My question is, were you involved in
2 discussions with the finance director at the time
3 about how to pay for the McLean third level
4 improvements?
5 A We didn't discuss. The money already in
6 the capital improvement budget submitted to the
7 City Council, approved by the City Council.
8 Q Okay.
9 A And --
10 Q I'm sorry. How much of that money came
11 from availability fees?
12 A I have no idea to --
13 MR. HOLZHEIMER: Objection, Your Honor.
14 THE COURT: Objection overruled.
15 BY MR. RAPHAEL:
16 Q You don't know?
17 A I don't know.
18 Q All right. Same question for the Tysons
19 Corner pump station. How much of the money that
20 paid for that project came from availability fees?
21 A Again, I don't know about the source of
22 that.

1 Q All right. You also testified on direct
2 examination about the Woodford Road water main in
3 the mid 1990s.

4 How did the City pay for that project?

5 A Pay as you go.

6 Q No bond funding, right?

7 A I don't think we issued bonds.

8 Q How much did that project cost?

9 A \$700,000.

10 Q All right. Were any availability fees
11 used to fund that project?

12 A Again, I don't know all the details.

13 Q Were you privy to discussions with the
14 then director of finance as to how that project
15 was funded?

16 A No. We just....

17 Q Okay. You were asked a lot of questions
18 on direct examination about what would the City
19 have done had it been financed one way or, you
20 know, not included profit.

21 You were not involved in discussions
22 with the director of finance on the question of

1 how these projects were funded; isn't that true?

2 A We don't know what the source of the
3 income, if there's -- we just propose a budget for
4 the project and submit to the City Manager and the
5 City Council approve -- for approval.

6 Q I understand that. But my question was,
7 you weren't involved in the discussions with the
8 director of finance as to how these projects were
9 funded; isn't that true?

10 A No, I'm not involved with that.

11 Q Thank you. To the best of your
12 knowledge, has the City been able to recover all
13 of its costs and expenses, direct and indirect,
14 associated with all of the projects you talked
15 about on direct examination?

16 A Yes.

17 Q All right. And am I correct,
18 Mr. Nguyen, that the City considered charging dual
19 rates or differential rates between inside-city
20 customers and outside-city customers in the year
21 2003?

22 MR. HOLZHEIMER: Objection, Your Honor.

1 Definitely outside the scope of my direct.

2 THE WITNESS: We never --

3 THE COURT: I'm going to permit it.

4 Objection overruled.

5 THE WITNESS: We never practiced that
6 type of rate differential.

7 BY MR. RAPHAEL:

8 Q I understand you never implemented one.
9 My question was different, though.

10 A In 2003?

11 Q Mr. Nguyen, in 2003, I know the City
12 didn't implement a dual-rate structure, but am I
13 correct that staff considered recommending a
14 dual-rate structure to the City Council for
15 inside-city customers and outside-city customers,
16 different rates?

17 A Some -- I don't recall -- I'm no longer
18 the general manager of the department. And I was
19 no longer the director of public utilities.

20 Q I understand.

21 A I was simply the utilities engineer.

22 And I -- I overheard, and somebody proposed that

1 idea. But the idea, you know, we never
2 implemented that rate differential in the Falls
3 Church system.

4 Q No. I understand that. And I was
5 really getting at a different point.

6 You were asked about the CDM engagement
7 on direct examination. Do you remember when
8 Mr. Holzheimer asked you that question?

9 A Yes.

10 Q You helped hire CDM, right?

11 A Yes. The selection panel.

12 Q Yes. And you were, at the time CDM was
13 hired, you were the director of public utilities,
14 right?

15 A Yes. From the beginning. And then....

16 Q And during the course of the CDM study,
17 you stepped down from the director of public
18 utilities to be the --

19 A Engineer.

20 Q -- an engineer. And Sam Beidas took
21 over as the director of public utilities, right?

22 A Actually, Sam Beidas was the general

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1 manager of the department. And -- well, Patrice
2 was the director.
3 Q Okay. And getting back to the CDM
4 engagement, isn't it true that CDM, that the
5 City's discussions with CDM surrounded whether to
6 have a dual-rate structure with a higher rate for
7 outside-city customers and a lower rate for
8 inside-city customers?
9 MR. HOLZHEIMER: Objection. Hearsay.
10 It's getting into what CDM discussed with the
11 City.
12 THE COURT: Well, I think he's phrasing
13 it the same way that you did, as a result of the
14 study, did you reach a certain conclusion, without
15 getting into the details of the study, which would
16 be impermissible hearsay.
17 Objection overruled.
18 THE WITNESS: I was no longer director
19 of public utilities during the discussion between
20 the general manager and the consultant.
21 BY MR. RAPHAEL:
22 Q I understand that. But, again, that

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1 wasn't my question.
2 And my question is, isn't it true that
3 one of the concepts on the table for consideration
4 by the public utilities was whether to go to a
5 dual-rate structure for water rates?
6 A I don't believe anybody in the public
7 utilities division had that idea.
8 Q All right. And you're aware, are you
9 not, that the M1 manual would permit a higher rate
10 to be charged to out-of-city customers than the
11 in-city customers.
12 You've read the manual. You are aware
13 of that, right?
14 A Well, the manual changes every year. So
15 from the thin book to this thick. So I have no
16 idea about the latest version.
17 Q All right. Well, at the time you were
18 familiar with it, isn't it true that it
19 permitted --
20 A That was the thin one.
21 Q Isn't it true that it contemplated or
22 permitted that a municipal utility using the

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1 utility method could come up with a higher rate
2 for its outside-city customers than its
3 inside-city customers?
4 A I believe so.
5 Q Right. And the higher rate can be based
6 on a return on equity in computing what the higher
7 rate should be, right?
8 A I have no idea. We never apply that,
9 so....
10 Q You didn't apply that.
11 Did you ever undertake an analysis to
12 determine how much the out-of-town rates would
13 have to be in order to pay for the system
14 improvements in Fairfax County?
15 A I was opposed from day one. So I never
16 tried to understand how they worked that out.
17 Q Okay. So you never investigated how
18 much --
19 A No.
20 Q -- you have to charge for an out-of-city
21 rate in order to pay for --
22 A Because --

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1 Q You need to let me finish the question.
2 Am I correct that you never investigated
3 how much an out-of-town rate would have to be,
4 including return on equity, to pay for the system
5 improvements in Fairfax County?
6 You never looked at that?
7 A I didn't care about that option, so I
8 just didn't.
9 Q All right. And can you identify for me
10 any action by the Falls Church City Council that
11 shows that it wouldn't have undertaken system
12 improvements in Fairfax County if it could not
13 have transferred money from the water fund to the
14 general fund?
15 A No. I didn't. I didn't know anything
16 about that.
17 Q You can't?
18 A I didn't know anything about that.
19 Q Okay.
20 MR. RAPHAEL: No further questions, Your
21 Honor.
22 THE COURT: Redirect.

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1 MR. HOLZHEIMER: Briefly, Your Honor.
2 THE COURT: Yes, sir.
3 REDIRECT EXAMINATION
4 BY MR. HOLZHEIMER:
5 Q Mr. Nguyen, Mr. Raphael asked you about
6 the adequacy of the system.
7 During the time you were at the City,
8 was the City's water system ever inadequate from a
9 health perspective?
10 A Yes. There have been 21 years worth of
11 City of Falls Church system, water system. And we
12 always met all of the requirements from the
13 Virginia Health Department. And we've never had
14 anything -- never have any failure.
15 Q So to clarify for the record, then, the
16 City never had a year where it was inadequate?
17 MR. RAPHAEL: Objection. Leading again.
18 MR. HOLZHEIMER: I thought his answer
19 was a little --
20 THE COURT: Well, I think it's all
21 right. But go ahead.
22 Do you understand the question,

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1 Mr. Nguyen?
2 THE WITNESS: Yes, Your Honor.
3 THE COURT: You may answer.
4 BY MR. HOLZHEIMER:
5 Q During the entire time?
6 A 21 years with the City, the Falls Church
7 system always met all the requirements.
8 Q From a health perspective?
9 A From the health department.
10 Q And during your time at the City, was
11 the City, from an engineering perspective, can you
12 explain to the Court what the adequacy or
13 inadequacy of the system was from an engineering
14 perspective.
15 A You mean the water pressure?
16 Q Yes.
17 A Yes. Always met the -- in the range of
18 20 to 80 psi.
19 Q Okay.
20 A Throughout the system.
21 MR. HOLZHEIMER: Okay. Thank you, Your
22 Honor. I have no further questions.

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1 THE COURT: Thank you, Mr. Holzheimer.
2 Thank you, Mr. Nguyen. You may step
3 down, sir.
4 THE WITNESS: Thank you.
5 THE COURT: Watch your step.
6 All right, Mr. Thomas.
7 MR. THOMAS: Thank you, Judge. If I
8 could, I would like to introduce our designations
9 from the 30(b)(6) -- I'm sorry, the Rule 4:5(b)(6)
10 deposition of Fairfax Water. It will take about
11 5 minutes.
12 THE COURT: That will be fine.
13 MR. THOMAS: I'll be glad to have an
14 assistant who can answer -- I'm not sure what the
15 Court's practice typically is. But I have an
16 assistant who can answer those questions or I can
17 simply read them in myself.
18 THE COURT: Whatever would be easier for
19 you.
20 MR. THOMAS: Okay. Why don't we do it
21 the first way.
22 THE COURT: All right.

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1 MR. THOMAS: Okay. And I have copies
2 here for the Court.
3 THE COURT: Thank you.
4 MR. THOMAS: Do you want one?
5 MR. RAPHAEL: If you have one, sure.
6 I do have an objection when we get to
7 line 89 -- I'm sorry, page 89.
8 THE COURT: All right.
9 MR. THOMAS: And one other point.
10 There is an objection that was noted by
11 Fairfax Water to a designation at the end of our
12 designations. And I'll withdraw that designation.
13 THE COURT: All right.
14 MR. THOMAS: So, in other words, we're
15 going to get to one later where there's an
16 objection.
17 THE COURT: All right.
18 MR. RAPHAEL: Mr. Thomas, was that the
19 one that was at page 149?
20 MR. THOMAS: 149, exactly.
21 MR. RAPHAEL: If you have a copy of what
22 you're going to read, I would appreciate it.

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1 MR. THOMAS: I do. I want to make sure
2 I've got enough.
3 MR. RAPHAEL: Thank you.
4 MR. THOMAS: And, Judge, I'm going to
5 hand Ms. Kleifges -- I think I introduced
6 Ms. Kleifges earlier.
7 THE COURT: You did. It's nice to see
8 you.
9 Thank you.
10 MR. THOMAS: I'm going to hand
11 Ms. Kleifges a copy of this. And if she could
12 proceed over to the witness stand.
13 THE COURT: All right. That's fine.
14 And who is the corporate designee?
15 MR. THOMAS: There were three, Your
16 Honor, depending on the topic.
17 THE COURT: All right.
18 MR. THOMAS: So for the record, what
19 we're reading from here is the Rule 4:5(b)(6)
20 deposition of Fairfax County Water Authority
21 commencing at 10 o'clock on Tuesday, August 4th,
22 2009.

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1 Ms. Kleifges, I'm going to start on
2 page 87, line 9.
3 (Whereupon, the designations of the Rule
4 4:5(b)(6) deposition of Fairfax County Water
5 Authority were read as follows:)
6 BY MR. THOMAS:
7 Q Question: All right. So the transfer
8 of \$1 that is over and above direct costs, you
9 think would be unreasonable, right?
10 A I believe that we don't think it's
11 appropriate.
12 Q Okay. All right.
13 Whenever you say "transfer," you mean in
14 the case of the City of Falls Church, a transfer
15 from the water fund to the general fund, right?
16 A Yes.
17 Q All right.
18 MR. THOMAS: And now, Your Honor, we're
19 going into counterdesignations. Line 19, page 87.
20 BY MR. THOMAS:
21 Q Question: Okay. That's how Fairfax
22 Water operates, right? It doesn't transfer any

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1 money anywhere. It's just pay as you go, cover
2 your direct costs.
3 MR. RAPHAEL: I withdraw the objection
4 that's next.
5 THE COURT: Thank you.
6 THE WITNESS: We do not have transfers
7 to out for those types of services.
8 BY MR. THOMAS:
9 Q Which is another way of saying you're an
10 enterprise fund, right?
11 A We are an enterprise fund.
12 MR. THOMAS: And, Your Honor, to
13 continue with the counterdesignations on page 89,
14 line 5.
15 BY MR. THOMAS:
16 Q All right. Okay.
17 Do you think that is the reasonable way
18 for the City of Falls Church to operate its water
19 system, right?
20 A I believe that funds collected in the
21 water system should stay in the water system for
22 which they were collected.

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1 For example, the City collected tens of
2 millions of dollars associated with fund
3 replacement. Then -- they then pulled those
4 monies that were an asset to the water system away
5 from the water system.
6 MR. THOMAS: Going to page --
7 MR. RAPHAEL: I'm sorry, Mr. Thomas, if
8 I can interrupt.
9 Mr. Edgemon submitted a correction to
10 this portion of the deposition. It's a very minor
11 one. At page 89, line 12, the phrase "fund
12 replacement" should read with "system replacement
13 fund."
14 MR. THOMAS: Okay.
15 MR. RAPHAEL: So the sentence should --
16 "for example, the City collected tens of millions
17 of dollars associated with system replacement
18 fund," period. "They then pulled those monies
19 that were an asset to the water system away from
20 the water system."
21 THE COURT: Okay.
22 MR. THOMAS: Thank you. Going on to

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1 page 91, line 9.
 2 BY MR. THOMAS:
 3 Q And they're not direct costs and they
 4 are transferred, then Fairfax Water's position is
 5 that those are profits by the City from its water
 6 system and they're not appropriate, right?
 7 MR. RAPHAEL: I'm sorry, Mr. -- I'm
 8 sorry, you're at page 89?
 9 MR. THOMAS: I'm on page --
 10 THE COURT: 91.
 11 MR. THOMAS: -- 91.
 12 MR. RAPHAEL: I don't think this was in
 13 your designation that you handed us. I'm seeing
 14 this for the first time, I believe.
 15 THE COURT: Let's see the designation.
 16 MR. THOMAS: If you could give us just a
 17 moment, Your Honor.
 18 THE COURT: Yes, sir.
 19 MR. THOMAS: Okay. We worked it out,
 20 Judge.
 21 And I'll proceed with page 91,
 22 line 9 through 20.

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1 THE COURT: Thank you.
 2 MR. THOMAS: I'll go ahead and ask the
 3 question again.
 4 BY MR. THOMAS:
 5 Q And if they're not direct costs and they
 6 are transferred, then Fairfax Water's position is
 7 that those are profits by the City from its water
 8 system and they're not appropriate, right?
 9 A If they are moved out, you call it
 10 profit or whatever. But it's taking funds that
 11 have been accumulated for the water system away
 12 from the water system. You call it anything you
 13 want to call it.
 14 Q Okay. All right.
 15 And Fairfax Water's view is that's not
 16 appropriate, right?
 17 A Correct.
 18 Q Has Fairfax Water ever conducted --
 19 MR. THOMAS: I'm sorry. We're now on
 20 page 95, Your Honor, line 1.
 21 BY MR. THOMAS:
 22 Q Has Fairfax Water ever conducted a rate

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1 study of the City of Falls Church's rates?
 2 A No.
 3 Q Has it ever conducted a cost of service
 4 study with respect to the City of Falls
 5 Church's --
 6 A No. When I say "no," not beyond what
 7 you've seen in the expert's testimony and to the
 8 degree that would be considered.
 9 MR. THOMAS: All right. And then over
 10 to page 99, Your Honor, line 5.
 11 BY MR. THOMAS:
 12 Q All right. Fairfax Water is not
 13 claiming a refund from the City of Falls Church,
 14 is it?
 15 A Correct.
 16 MR. THOMAS: Line -- I'm sorry,
 17 page 130, line 15.
 18 BY MR. THOMAS:
 19 Q Mr. Murray, has it ever been part of
 20 Fairfax Water's mission to acquire other water
 21 systems in Fairfax County?
 22 A Yes.

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1 Q Okay. And why has that been part of the
 2 mission of Fairfax Water?
 3 A Why. Well, I would be speculating on
 4 the intentions and the Board of Supervisors in
 5 1957.
 6 But I can tell you our mission is to --
 7 is to -- I forgot the first word, establish,
 8 operate and maintain a comprehensive integrated
 9 water supply system. And one of the means by
 10 which to do that identified in our mission was to
 11 acquire systems or to construct new.
 12 Q And is the acquisition of other systems
 13 within Fairfax County currently stated in the
 14 mission of Fairfax Water?
 15 A Our mission hasn't changed.
 16 MR. THOMAS: And then on line 13.
 17 BY MR. THOMAS:
 18 Q Over what period of time has Fairfax
 19 Water given any consideration to acquiring the
 20 water system in the City of Falls Church?
 21 A Since 1985.
 22 (Whereupon, the reading of the

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1 Rule 4:5(b)(6) deposition of Fairfax County Water
2 Authority concluded.)
3 MR. THOMAS: Okay. And that's it,
4 Judge.
5 And as I said, there is one more here
6 that's shown in your packet, but we've withdrawn
7 that one.
8 THE COURT: All right.
9 MR. THOMAS: Okay.
10 THE COURT: Thank you very much.
11 Yes, sir.
12 MR. THOMAS: Okay. We call Chuck
13 Murray.
14 Whereupon,
15 CHARLES M. MURRAY
16 was called as a witness, and, having first been
17 duly sworn, was examined and testified as follows:
18 DIRECT EXAMINATION
19 BY MR. THOMAS:
20 Q Good afternoon, Mr. Murray.
21 A Good afternoon.
22 Q Mr. Murray, you testified earlier at the

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1 outset of this case about a lawsuit that Fairfax
2 Water filed against the City in this Court.
3 Do you remember that?
4 A Yes, sir.
5 Q All right. And that's a lawsuit Fairfax
6 Water filed in 1959, right?
7 A Yes.
8 Q All right. And that's the lawsuit where
9 Fairfax Water alleged that the City was profiting
10 from its water operations in Fairfax County,
11 right?
12 A Yes.
13 Q And that's the lawsuit in which Fairfax
14 Water said that the profits the City was taking
15 from its operations in Fairfax County were paid
16 into the City's general fund and used solely for
17 the benefits of persons residing within the City,
18 right?
19 A I don't recall that I said that.
20 Q Okay. But that's what the lawsuit said,
21 right?
22 A I'm not sure it was that specific.

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1 Q Okay. Why don't you --
2 A If you --
3 Q There are a number of exhibit books over
4 there, as I think you know.
5 If you would turn to the one from the
6 defendant's exhibit, and it would be Exhibit 72.
7 So I think it's going to be in the last book.
8 A I have it.
9 Q Okay. And Exhibit 72, that's the --
10 that is the cover letter. And behind it -- a
11 cover letter from Fairfax Water's lawyer. And the
12 complaint behind it is the complaint that we've
13 just been talking about, right?
14 A Yes.
15 Q All right. Take a look at paragraph 10
16 of that lawsuit, please, Mr. Murray.
17 Do you see where paragraph 10 -- that's
18 down at the bottom of page 2 of the complaint. Do
19 you see that?
20 A Yes, I have it.
21 Q Okay. Do you see where that says -- I'm
22 just going to read from it, okay?

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1 A Yes.
2 Q "That, on information and belief, your
3 complainant alleges that the defendant does not
4 operate said system in its governmental capacity,
5 but that it operates the same as a proprietary
6 function realizing substantial profits on the said
7 operation in Fairfax County which profits are paid
8 into the general fund of the defendant and used
9 solely for the benefit of the persons residing
10 within the said corporate limits."
11 Do you see that?
12 A Yes.
13 MR. RAPHAEL: Your Honor, just for the
14 record, I'd like to renew my objection, that none
15 of this information that is the subject of this
16 current line of examination was disclosed by the
17 City in its answers of interrogatories in
18 connection to any of its affirmative defenses.
19 This is all new. Not in their
20 interrogatory responses.
21 So I think it's improper. And I'd like
22 a standing -- if the Court is not going to

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1 reconsider the objection, I'd like a standing
2 objection with regard to the inquiry about these
3 things.
4 THE COURT: All right. I mean, there's
5 not going to be a great deal to this area, I don't
6 think. I didn't mean in terms of substance. I
7 mean in terms of questioning.
8 I think it's permissible.
9 MR. RAPHAEL: May I have a standing
10 objection.
11 THE COURT: Yes, sir. Absolutely.
12 BY MR. THOMAS:
13 Q Okay. I read that paragraph correctly,
14 didn't I?
15 A Yes.
16 Q All right. And the complainant or the
17 plaintiff in the suit in which we were just
18 reading from is Fairfax Water, right?
19 A Yes.
20 Q And the City was the defendant.
21 A Yes.
22 Q All right.

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1 MR. THOMAS: Your Honor, I would move
2 admission of Defendant's Exhibit 72. I have a
3 certified copy which I actually would like to be
4 the exhibit.
5 THE COURT: That was not admitted
6 before?
7 MR. THOMAS: It was not -- well, it
8 was -- I didn't move for admission. I don't
9 believe that Fairfax Water did.
10 THE COURT: All right.
11 Do you have any objection, Mr. Raphael?
12 We can almost take judicial notice of it if it's
13 some court file half a century ago.
14 MR. RAPHAEL: Just the objection based
15 on relevance and the fact that it wasn't disclosed
16 in discovery.
17 So those are my objections, Your Honor.
18 THE COURT: All right. It will be
19 received.
20 (Defendant's Exhibit 72 was received
21 into evidence.)
22 MR. THOMAS: All right, Judge. I do --

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1 I do have a certified copy here which we'll hand
2 up to the clerk.
3 THE COURT: That will be fine.
4 MR. THOMAS: Okay. Thank you, Judge.
5 BY MR. THOMAS:
6 Q And, Mr. Murray, just briefly on this
7 issue, Fairfax Water, before it filed that
8 lawsuit, it called on the City publicly to abandon
9 its plans to extend this water main down Gallows
10 Road that was part of the dispute here, right?
11 A Yes, sir.
12 Q Okay. In fact, if you would pull
13 another book there, it's going to be the first
14 book, Mr. Murray. It would be Exhibit 2.
15 Do you see Exhibit 2 there, Mr. Murray?
16 A Yes, sir.
17 Q All right. That's a -- Fairfax Water
18 press release, right?
19 A Yes. It appears to be.
20 Q All right. And this is from March 13,
21 1959, correct?
22 And do you see, halfway down the first

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1 paragraph, where the water -- Fairfax County Water
2 Authority said in this press release: "The
3 authority characterized this action as being
4 contrary to the public interest and motivated
5 solely by the desire of the City to enlarge upon
6 its profit making operations at the expense of the
7 residents of the County."
8 Do you see that?
9 A Yes.
10 MR. THOMAS: All right. I move for
11 admission of Defendant's Exhibit 2.
12 MR. RAPHAEL: Same objections, Your
13 Honor. Relevance. And this was not disclosed in
14 the interrogatory answer.
15 THE COURT: I'm going to permit it.
16 It's a press release, predating the filing of the
17 suit that the complaint was already admitted. I
18 don't know how much weight can be given to a press
19 release. But it's a bench trial.
20 It will be received.
21 (Defendant's Exhibit 2 was received into
22 evidence.)

1 MR. THOMAS: Thank you, Judge.
 2 THE COURT: Yes, sir.
 3 BY MR. THOMAS:
 4 Q Now, Mr. Murray, this lawsuit in 1959
 5 was settled I believe you testified earlier. And
 6 the City and Fairfax Water entered into what's
 7 been referred to as the 1959 agreement, right?
 8 A Yes.
 9 Q And that agreement, among other things,
 10 it established exclusive service territories as
 11 between the City and Fairfax Water in parts of
 12 Fairfax County, right?
 13 A Yes, it did.
 14 Q All right. And that agreement expired
 15 in 1989, right?
 16 A Yes, it did.
 17 Q All right. So as of 1989, Fairfax Water
 18 considered itself free to provide service anywhere
 19 within Fairfax County, right?
 20 A I would say so.
 21 Q Right. The agreement had expired,
 22 right?

1 A I mean, I don't have personal knowledge
 2 as to what Fairfax Water felt about the expiration
 3 agreement in 1989 because I didn't arrive at the
 4 authority until 2003.
 5 Q Okay. But you're not aware of any
 6 reason why Fairfax Water felt constrained from
 7 providing water service anywhere within Fairfax
 8 County as of the expiration of that agreement,
 9 right?
 10 A I really can't say.
 11 Q Okay. All right.
 12 Now, one of the areas that was in the
 13 exclusive service territory of the City of Falls
 14 Church under the 1959 agreement is the area along
 15 Route 50 there at Arlington Boulevard right near
 16 where Fairfax Water's offices are, right?
 17 A Yes.
 18 Q All right. And that's right across
 19 from -- right across Route 50 where Fairfax Water
 20 has its transmission main, right? I think you
 21 testified about that earlier.
 22 A Yes.

1 Q All right. And then Fairfax Water moved
 2 into -- actually Fairfax Water actually built a
 3 new headquarters building in the '90s right there
 4 around the corner from what's the P&E building
 5 now, right?
 6 A Yes.
 7 Q Okay. And so that headquarters building
 8 is right there on Executive Park Avenue in
 9 Merrifield right around the corner from the P&E
 10 building, right?
 11 A Yes, it is.
 12 Q And that was, let's see, 8 years after
 13 the 1959 agreement expired, right?
 14 A Yes, sir.
 15 Q 1997?
 16 A Yes, it was.
 17 Q And then in 1997, when Fairfax Water
 18 built its new headquarters there, the City of
 19 Falls Church offered water service, right?
 20 A To -- I'm sorry. I -- I missed part of
 21 that. Restate the question.
 22 Q Okay. In 1997, when Fairfax Water built

1 its new headquarters building there, the City of
 2 Falls Church offered water service for it, right?
 3 A Yes.
 4 Q All right. And, in fact, Mr. Murray,
 5 Fairfax Water and the City actually got into a
 6 contract so that the City could provide water
 7 service and establishing easements there for the
 8 City to provide water service to Fairfax Water,
 9 right?
 10 A Got into a contract.
 11 Q Yeah.
 12 A I'm not aware of any contract.
 13 Q Okay. I think in the same book you have
 14 there, if you turn to Exhibit 41, please.
 15 MR. RAPHAEL: I'm sorry, Mr. Thomas, I
 16 didn't hear.
 17 MR. THOMAS: Yeah. 41.
 18 MR. RAPHAEL: Thank you.
 19 THE WITNESS: Forty --
 20 BY MR. THOMAS:
 21 Q 41.
 22 A Thank you.

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1 Q Do you have that there, Mr. Murray?
2 A Yes, I do.
3 Q Okay. If you would go to the second
4 page of Exhibit 41. Do you see where at the top
5 it says The City of Falls Church Easement
6 Agreement?
7 A Yes.
8 Q Do you see where it says: This
9 agreement is made and entered into the 2nd day of
10 November, 1995?
11 Do you see that?
12 A Yes.
13 Q All right. And it's between Fairfax
14 Water, right?
15 A Yes.
16 Q And the City of Falls Church, right?
17 A Yes.
18 Q And then if you look down at the second
19 paragraph, it indicates there in the third line
20 that the owner, which is Fairfax Water, right?
21 A Yes.
22 Q Okay.

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1 "The owner does hereby grant and convey
2 onto the City, its successors and assigned an
3 easement and right-of-way for the purpose of
4 constructing, operating, maintaining, adding to or
5 altering present or future water lines or water
6 services."
7 Do you see that?
8 A Yes.
9 Q And then the sentence continues?
10 A Yes.
11 Q So this is an agreement between the City
12 of Falls Church and Fairfax Water with respect to
13 water service there at the site where the
14 headquarters building was built, right?
15 A Yes.
16 MR. THOMAS: So, Judge, I would move for
17 admission of these three pages of Exhibit 41.
18 Your Honor, the last three pages of Exhibit 41
19 have already been admitted. And these three
20 pages, which are Bates labeled FW-LIT 002342
21 through 2344 are what I move into evidence.
22 And, Your Honor, I have a certified copy

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1 of the easement agreement.
2 THE COURT: Any objection, Mr. Raphael?
3 MR. RAPHAEL: Just the same objection
4 I've had before, Your Honor, that this is going to
5 defenses which, in this document nor -- neither
6 this document nor the matters that it relates to
7 were disclosed in discovery as a factual basis for
8 the defense.
9 THE COURT: All right. Well, I'm going
10 to permit it.
11 MR. THOMAS: I'm sorry?
12 THE COURT: I'm going to permit it.
13 MR. THOMAS: Thank you, Judge.
14 (Defendant's Exhibit 41 was received
15 into evidence.)
16 BY MR. THOMAS:
17 Q So this agreement between City of Falls
18 Church and Fairfax Water was entered into after
19 the 1959 agreement expired, right?
20 A Yes.
21 Q All right. And then the City of Falls
22 Church offered water service to the site and told

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1 Fairfax Water what the tap fees would be, right?
2 A I believe so.
3 Q Okay. In fact, if you turn a couple of
4 pages over, Mr. Murray, to Exhibit 41 to the part
5 that was previously admitted, you see there the
6 letter from the City of Falls Church department of
7 public utilities to the Water Authority indicating
8 the fees that the Water Authority should pay in
9 order to connect to water service from the City,
10 right?
11 A Yes.
12 Q Okay. And Fairfax Water agreed to pay
13 that, right?
14 A Yes, we did.
15 Q Okay. In fact, if you look at the next
16 page, Fairfax Water issued a -- it's not very easy
17 to read, Mr. Murray, I apologize.
18 But if you look at the next page, you'll
19 see that Fairfax Water issued a purchase order
20 that indicates that the City of Falls Church was
21 the vendor in this transaction, right?
22 A Yes.

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1 Q Okay. Purchase order there is for the
2 same amount as was shown on the tap fees offered
3 on the prior page, right?
4 A Yes.
5 Q And that's \$26,220, right?
6 A Yes.
7 Q Okay. And Fairfax Water paid that
8 charge, right?
9 A Yes.
10 Q In order to connect to the City's
11 service, right?
12 A Yes.
13 Q Okay. And, in fact, Fairfax Water has a
14 receipt of having paid that. In other words, they
15 got a receipt from the City of Falls Church, which
16 is in the next page, right?
17 A Yes.
18 Q Okay. And that's how Fairfax Water
19 became a customer of the City of Falls Church in
20 1997, right?
21 A Correct.
22 Q You didn't look into switching over to

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1 your own water service until May of 2008, right?
2 A I personally did not.
3 Q Right. And you're not aware of any
4 efforts prior to that time, right?
5 A I'm aware of efforts by prior general
6 managers to evaluate the cost of connecting that
7 building and the P&E building to our own system.
8 Q And you're not aware of any steps
9 external to Fairfax Water that any of those prior
10 general managers took in order to connect its
11 buildings to its own water system, right?
12 A I am not.
13 Q Now, Mr. Murray, Fairfax Water has
14 considered acquiring the City of Falls Church's
15 water system in the past, right?
16 A That's correct.
17 Q All right. And I believe you're aware
18 that it's considered acquiring the City's water
19 system since at least 1985?
20 A That's correct.
21 Q Okay. And you know, don't you, that the
22 City -- I'm sorry, that Fairfax Water made an

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1 offer to buy the City of Falls Church's water
2 system in 1985, right?
3 MR. RAPHAEL: Your Honor, I think at
4 this point I'm going to rise and -- every question
5 so far has been leading. I haven't objected.
6 But I think there's been no showing of
7 adversity with this witness. I think these
8 questions should not be leading.
9 THE COURT: Well, try not to lead,
10 Mr. Thomas. I agree.
11 MR. THOMAS: All right.
12 BY MR. THOMAS:
13 Q Now, Mr. Murray, relating to the 1985
14 offer that you just testified about, what, if
15 anything, did Fairfax Water do to include in its
16 offer to the City a recognition of the City's
17 return that it takes to its general fund for its
18 water system?
19 MR. RAPHAEL: Also, I'm going to object
20 based on lack of foundation. The gentlemen
21 testified he didn't arrive until 2003. I don't
22 think he can testify about what was considered or

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1 done in 1985.
2 THE COURT: Mr. Thomas.
3 MR. THOMAS: Judge, as the corporate
4 testimony that just came in showed, Fairfax Water,
5 through its corporate witness, understood that it
6 had made an offer and testified about having made
7 an offer in 1985 to the City of Falls Church for
8 its water system. And I think I can explore with
9 this witness --
10 THE COURT: Well, ask him if he knows
11 it.
12 MR. RAPHAEL: Well, respectfully --
13 THE COURT: Sir.
14 MR. RAPHAEL: -- a 4:5(b)(6) deposition
15 is one thing. It's a discovery device. And the
16 rules allow a person who doesn't have personal
17 knowledge to testify and to bind the corporation.
18 THE COURT: Right.
19 MR. RAPHAEL: And we've done that. And
20 they've offered whatever 4:5(b)(6) testimony they
21 want.
22 THE COURT: Right.

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1 MR. RAPHAEL: If they're going to ask a
2 fact witness in his personal capacity what he
3 knows and did, they've got to establish a
4 foundation to do that.
5 THE COURT: Well, that's what I said.
6 MR. RAPHAEL: Right.
7 THE COURT: Ask him whether or not he
8 knows.
9 BY MR. THOMAS:
10 Q Okay. You know, don't you, that in
11 1985, Fairfax Water made an offer to the City of
12 Falls Church to purchase the City's water system,
13 right?
14 A Yes.
15 Q And you're familiar with the terms of
16 that offer, right?
17 A From what I have read, yes.
18 Q You've seen those terms before, correct?
19 A Yes.
20 Q All right. Take a look at Defendant's
21 Exhibit 15, please. It should be in that same
22 book, Mr. Murray.

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1 Do you have that, Mr. Murray?
2 A Yes, sir.
3 Q All right. This is a letter, is it not,
4 of April 15th, 1985, from the Fairfax County Water
5 Authority to the Mayor and the City Council of the
6 City of Falls Church, right?
7 A Yes.
8 Q You've seen this letter before, right?
9 A Yes.
10 Q You're familiar with the terms that it
11 lays out for a structure of the deal pursuant to
12 which Fairfax Water -- pursuant to which Fairfax
13 Water would purchase the City's water system,
14 right?
15 MR. RAPHAEL: Objection. Leading.
16 Leading. Leading.
17 THE COURT: All right. Please try not
18 to lead.
19 MR. THOMAS: Thank you, Judge.
20 BY MR. THOMAS:
21 Q Now, take a look at this first
22 paragraph, Mr. Murray. Do you see where it says,

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1 three lines down from the top, however --
2 MR. RAPHAEL: Objection, Your Honor. I
3 don't believe that it's proper to read from a
4 document that is not in evidence.
5 THE COURT: Well, the document is before
6 the witness, though. And he can ask him about it.
7 This is a document that has been -- that has been
8 issued by the plaintiff in this case. It
9 certainly is going to be admissible.
10 Objection overruled.
11 MR. THOMAS: Thank you, Judge.
12 BY MR. THOMAS:
13 Q Mr. Murray, you see three lines down
14 from the top of the first paragraph, you see where
15 it says: "However, the time has probably arrived
16 where this water system, which primarily serves
17 customers in Fairfax County, should be transferred
18 to the Fairfax County Water Authority, the Board
19 of Supervisors, water agency."
20 Do you see that?
21 A Yes.
22 Q And you understood that was one of the

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1 bases for an offer made by Fairfax Water, right?
2 A I only understand what I read.
3 Q Right. Okay.
4 And you see where Fairfax Water wrote:
5 "The majority of the customers would then have
6 some constituent input relative to their service
7 and rates."
8 Do you see that?
9 A Yes.
10 Q And that's a concern that you yourself
11 have held with respect to the City providing water
12 service in Fairfax County, right?
13 A Yes.
14 Q And that's been true since you've been
15 the general manager of Fairfax Water, right?
16 A Yes.
17 Q Okay. Now, looking at the first item
18 here, do you see where this letter says: "The
19 Authority and the County will pay the City
20 \$520,000 and \$55,000, respectively, a year for
21 50 years, in return for the transfer of the water
22 system to the authority and for the transfer of

Page 1319

1 the sewer system to the County."
 2 Do you see that?
 3 A Yes.
 4 Q All right. And that's consistent with
 5 your understanding of this offer from 1985, right?
 6 A Yes.
 7 Q All right. And take a look down there
 8 at item number 2 of this same offer letter from
 9 Fairfax Water.
 10 Do you see where it says: "The City
 11 will retain for its general fund the cash on hand
 12 at the time" of the transfer -- "of transfer
 13 accumulated from its water and sewer system, which
 14 was put aside for renewals and replacements of its
 15 system."
 16 Do you see that?
 17 A Yes.
 18 Q All right. And that's also consistent
 19 with your understanding of this offer from 1985,
 20 right?
 21 MR. RAPHAEL: Objection. Leading.
 22 THE WITNESS: I mean --

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1 THE COURT: I'm sorry. I was looking at
 2 something else.
 3 What is the question?
 4 MR. THOMAS: My question was whether the
 5 item number 2 on page 1 of Exhibit 15 was also
 6 consistent with his understanding of the offer
 7 made by Fairfax Water to the City.
 8 THE COURT: Objection overruled.
 9 All right. Actually, it's 1 o'clock.
 10 Why don't we break.
 11 MR. THOMAS: All right.
 12 THE COURT: The Court will be in recess
 13 for one hour.
 14 (Whereupon, at 1:02 p.m., the hearing
 15 was recessed, to be reconvened at 2:00 p.m. this
 16 same day.)
 17
 18
 19
 20
 21
 22

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1 AFTERNOON SESSION (2:11 p.m.)
 2 THE COURT: All right, Mr. Thomas.
 3 MR. THOMAS: Thank you, Judge.
 4 THE COURT: Yes, sir.
 5 Whereupon,
 6 CHARLES M. MURRAY
 7 having been previously duly sworn, was examined
 8 and testified further as follows:
 9 DIRECT EXAMINATION (Continued)
 10 BY MR. THOMAS:
 11 Q Mr. Murray.
 12 A Good afternoon, Mr. Thomas.
 13 Q We were talking about Exhibit 15, which
 14 is the April 15, 1985 letter from Fairfax Water to
 15 the City Council of Falls Church and the Mayor.
 16 Do you remember that testimony?
 17 A Yes, sir.
 18 Q All right. And look if you would,
 19 please, at the second page of Defendant's
 20 Exhibit 15. Do you see the first full paragraph
 21 there where it begins "we recognize"?
 22 A Yes, sir.

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1 Q All right. Three lines down do you see
 2 where Fairfax Water wrote to the City Council and
 3 the Mayor, quote, "The basic intent of our offer
 4 is to provide Falls Church with an income that is
 5 equivalent to their current return from their
 6 water and sewer systems without their having to
 7 operate the same." Do you see that?
 8 A Yes, sir.
 9 Q Is that consistent with your
 10 understanding of the offer that was made by
 11 Fairfax Water to the City of Falls Church in 1985?
 12 A Yes, sir.
 13 MR. RAPHAEL: Objection. Same standing
 14 objection.
 15 THE COURT: Yes, sir.
 16 MR. RAPHAEL: And asked and answered. I
 17 think he's been through this several times now.
 18 THE COURT: Yes, sir.
 19 BY MR. THOMAS:
 20 Q And do you see, Mr. Murray, the last
 21 line of that same paragraph where Mr. Morin
 22 writes: "We believe that transfer of the system

1 will ameliorate the many problems which the City
2 inevitably faces in operating 90 percent of its
3 system in Fairfax County." Do you see that?

4 A Yes, sir.

5 Q And that's something that you have later
6 characterized as a political problem for the City
7 of Falls Church, right?

8 MR. RAPHAEL: Objection. Leading.

9 MR. THOMAS: Judge, if I could --

10 THE COURT: Try not to lead.

11 MR. THOMAS: If I could, Judge. This
12 is, I think under 8.01-401(a), this is an adverse
13 party. And, generally speaking, he can be treated
14 as an adverse witness for purposes of litigation.

15 THE COURT: Well, it's not that clear
16 any longer. I think that a party -- simply
17 because a party is the opposite party doesn't
18 render that party adverse. But it's a bench
19 trial. So a little leading is fine.

20 MR. THOMAS: Okay. Thank you, Judge.

21 BY MR. THOMAS:

22 Q That's something you've characterized as

1 a -- this last sentence of this paragraph here
2 that you just read, that's something you've
3 characterized as a political problem, right?

4 A It's a political, it's a legal, and it's
5 a financial problem.

6 Q All three of those things?

7 A Yes, sir.

8 Q And it was all three of those things in
9 1985, right?

10 A I think -- I'm not sure it was exactly
11 the same conditions in 1985. But I have
12 characterized it as a political, a legal and a
13 financial problem.

14 MR. THOMAS: Your Honor, I would move
15 Defendant's Exhibit 15.

16 THE COURT: It will be received.

17 MR. RAPHAEL: Same objections, Your
18 Honor.

19 THE COURT: Yes, sir. Subject to your
20 objection.

21 (Defendant's Exhibit 15 was received
22 into evidence.)

1 BY MR. THOMAS:

2 Q Mr. Murray, did the City and Fairfax
3 Water do a transaction for the City's water system
4 in the 1980s?

5 A They did not.

6 Q And the City in fact declined Fairfax
7 Water's offer, right?

8 A Yes.

9 Q Okay. Now, did Fairfax Water try again
10 in the 2006 time frame to acquire the City's water
11 system?

12 A I wouldn't say we attempted to acquire
13 the City's water system. We initiated discussions
14 with the City in 2004 in an attempt to try to come
15 to some resolution of what we considered to be an
16 unsustainable situation.

17 It never got to the point of
18 discussion -- serious discussion about acquisition
19 of the City's water system.

20 Q All right. And the unsustainable
21 situation that you just identified was the City of
22 Falls Church providing water service to residents

1 of Fairfax County, right?

2 A And all the problems associated with
3 that.

4 Q All right. Same problems identified in
5 this 1985 letter, right?

6 A And then some.

7 Q Okay. So the problems had grown --

8 A Yes, sir.

9 Q -- in the interim, right?

10 A Yes, sir.

11 Q All right. And in fact you contacted
12 the City Manager for the City of Falls Church in
13 an effort to engage in the discussion that you
14 just talked about, right?

15 A Yes, I did.

16 Q All right. Take a look, if you would,
17 at Defendant's Exhibit 37, please.

18 THE COURT: I'm sorry, which number?

19 MR. THOMAS: Defendant's Exhibit 37,
20 Your Honor.

21 THE COURT: 37. Thank you.

22 BY MR. THOMAS:

1 Q Do you have that?
 2 A Yes, sir.
 3 Q And what is the first page of
 4 Defendant's Exhibit 37, Mr. Murray?
 5 A It's a memo -- it appears to be a
 6 memo -- I'm sorry, an E-mail from me to Wyatt
 7 Shields dated Tuesday, December 19th, 2006.
 8 Q Right. And you indicate in the first
 9 line there to Wyatt -- who is Mr. Shields, right?
 10 A Yes.
 11 Q Quote, "I'm told that our board
 12 chairman, Phil Allin, spoke with Mayor Gardner
 13 last week and they discussed scheduling a meeting
 14 after the new year." Do you see that?
 15 A Yes.
 16 Q And that's the meeting to discuss the
 17 host of problems that you identified a moment ago,
 18 right?
 19 A Yes.
 20 Q And what if anything did you do,
 21 Mr. Murray, to propose a set of discussion topics
 22 for that meeting?

1 A I think I proposed a very brief draft
 2 agenda and sent it as an attachment with this
 3 E-mail.
 4 Q Right. And if you turn the page, that's
 5 the brief draft agenda that you're talking about,
 6 right?
 7 A Yes.
 8 Q All right. And you drafted this agenda?
 9 A Yes, sir.
 10 Q All right. The discussion that you --
 11 or I should say your E-mail from the first page
 12 was from the end of December, 2006, right?
 13 A Yes.
 14 Q All right. And you suggested to
 15 Mr. Shields here in your meeting -- draft meeting
 16 agenda a discussion of current realities, right?
 17 A Yes.
 18 Q Okay. And how did you break down those
 19 two current realities?
 20 A Financial and political.
 21 Q Okay. And by financial, tell the Court
 22 what you meant.

1 A I meant that -- well, first of all, let
 2 me back up to the first item on the agenda, 1959
 3 water service agreement, expired in 1989. That's
 4 a reference to the legal problems that I saw in
 5 this situation. There was no binding legal
 6 agreement between the City of Falls Church and
 7 Fairfax Water. So that's a legal problem.
 8 The financial problem from my
 9 perspective was that the City was charging
 10 residents of Fairfax County twice as much for
 11 their water as was Fairfax Water at the time. And
 12 that -- that differential in commodity rate was
 13 causing a number of complaints from Fairfax --
 14 from the City of Falls Church Water customers to
 15 their elected officials on the Board of
 16 Supervisors.
 17 And the elected officials would contact
 18 us, you know, asking what could be done to try to
 19 resolve that situation.
 20 I suggested to the City Manager that
 21 this differential in commodity rate would in
 22 effect -- would, in effect, cap the rate that the

1 City could charge its customers, and thereby
 2 gradually become more of a financial concern for
 3 the City. That it would -- it would limit the
 4 amount of rate increases that the City could --
 5 could implement.
 6 And that, because of the political
 7 situation, the greater that differential in
 8 commodity rate became, I thought the more
 9 difficult the political situation would become.
 10 Q All right. And your identification of
 11 the financial issues here for the City also
 12 included your concern that the City's ROI would
 13 decrease as a consequence of the cap that you just
 14 identified on the commodity rate you felt they
 15 could charge, right?
 16 A Yeah. It had increased by a factor of
 17 10 by this point since the discussions in 1985, or
 18 since 1984. And I felt that, you know, it would
 19 decrease considerably.
 20 Q I'm sorry, but when you say "it," you
 21 mean the ROI, right?
 22 A Yes, sir.

1 Q And by that you mean the transfer from
2 the water fund to the general fund, right?

3 A Yes.

4 Q You understood that by the time you had
5 created this agenda, that had increased over the
6 preceding 10 years, right?

7 A Yes.

8 Q Your point to the City Manager at this
9 time was you, the City, you're likely to see a
10 decrease in that ROI, right?

11 A Yes.

12 Q And that's what you meant by this
13 item --

14 MR. RAPHAEL: Your Honor, if I may
15 object, this is leading again. The code section
16 that Mr. Thomas cites refers to calling an adverse
17 party to testify. Mr. Murray is not an adverse
18 party. He hasn't even established the basis for
19 adversity.

20 THE COURT: I know that. I'm familiar
21 with that, Mr. Raphael. Just try not to lead.
22 We're not going to quarrel about the rule. You

1 can examine him perfectly satisfactorily without
2 leading questions.

3 MR. RAPHAEL: Thank you.

4 MR. THOMAS: Thank you, Your Honor.

5 BY MR. THOMAS:

6 Q So look, if you would, Mr. Murray, at
7 item A(b)III on this agenda. Do you see that?

8 A Yes.

9 Q And that identifies a decreasing ROI,
10 right?

11 A Yes.

12 Q And explain to the Court what you meant
13 by decreasing ROI.

14 A That it would go down.

15 Q "It" being the transfer from the water
16 fund to the general fund?

17 A The return on investment.

18 Q What reason did you have to think, if
19 any, that that would be of concern to the City?

20 A Well, I think it was obvious that it
21 would be. I mean, decreasing revenue would be a
22 concern to any enterprise.

1 Q Now, you indicate also on your agenda,
2 Mr. Murray, as item A(c), "where do we go from
3 here?" Do you see that?

4 A Yes.

5 Q All right. Can you explain to the Court
6 what you were proposing for discussion purposes
7 with the City when you drafted this agenda in
8 19- -- I'm sorry, in 2006?

9 A Well, it wasn't obvious to me where we
10 would go from here. At this point, we were
11 exploring possibilities. And it just seemed to
12 me, in terms of a draft agenda, it would be good
13 to recap what discussions had occurred previously
14 between the two organizations. And you can see, I
15 asked the question, is a negotiated agreement
16 possible? It wasn't clear to me that it was.

17 Q All right. What, if anything, did you
18 say in this draft agenda, Mr. Murray, about the
19 City's rates and charges being unlawful?

20 A I didn't say anything.

21 Q And you didn't say anything in the
22 context of your discussions with them on that

1 subject either, did you?

2 A No.

3 MR. RAPHAEL: Objection. Leading again.

4 THE COURT: All right.

5 THE WITNESS: No. I mean, at this
6 point, I was seeking a negotiated agreement to
7 replace the 1989 agreement, which had expired.

8 BY MR. THOMAS:

9 Q Okay. Now, Mr. Murray, Fairfax Water
10 has made certain statements to third-party
11 developers about the City of Falls Church's water
12 system, right?

13 A I'm not sure.

14 Q You're not sure if Fairfax Water has
15 made any representations to third-party developers
16 about the City of Falls Church's water system?

17 A I'm not sure I understand the question.
18 We made -- in what context?

19 Q Well, let me show you a document,
20 Mr. Murray --

21 A Thank you.

22 Q -- and that might help.

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1 MR. THOMAS: Judge, if I could, could I
2 hand up to the witness --
3 THE COURT: Yes, sir.
4 MR. THOMAS: Do you want to do that?
5 Thank you so much. What's been marked for
6 identification purposes as Defendant's Exhibit 92.
7 And I have a copy for the Court.
8 MR. RAPHAEL: Your Honor, if Mr. Thomas
9 is going to examine this witness about this
10 Exhibit 92, I would object to the exhibit that it
11 was not disclosed on the defendant's exhibit list.
12 THE COURT: Mr. Thomas.
13 MR. THOMAS: Judge, I'm just going to
14 ask him about it to refresh his recollection.
15 THE COURT: I'm sorry?
16 MR. THOMAS: I'm just going to ask him
17 about it to refresh his recollection.
18 THE COURT: You're not going to offer it
19 as an exhibit?
20 MR. THOMAS: I don't intend to.
21 THE COURT: Mr. Raphael.
22 MR. RAPHAEL: Well, I guess it depends

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1 on what the point is for which he's trying to
2 refresh. He hasn't established that.
3 THE COURT: Why don't we see where we
4 go.
5 MR. THOMAS: Okay.
6 BY MR. THOMAS:
7 Q Mr. Murray, take a look at what's been
8 identified as Defendant's Exhibit 92.
9 A Yes.
10 Q Do you recognize that document?
11 A Yes, I do.
12 Q Would you tell the Court what it is?
13 A It's a letter from our director of
14 planning and engineering to the vice president of
15 land planning and development for Pulte Homes
16 regarding a development project, the Metro West
17 development, offering information about the
18 Fairfax Water system in the event that the
19 developer would choose to select Fairfax Water to
20 serve that development.
21 Q What's the date of this letter?
22 A February 15th, 2007.

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1 Q All right. Turn to the second page, if
2 you would, Mr. Murray. Do you see where in this
3 letter to the Pulte Homes developer in
4 paragraph 4, the director of planning and
5 engineering for Fairfax Water indicates --
6 MR. RAPHAEL: Excuse me. Excuse me,
7 Mr. Thomas. Now he's going to read from the
8 exhibit, which is not a proper exhibit because it
9 wasn't on the exhibit list. I object. It's
10 improper.
11 THE COURT: I think that you can only
12 ask the witness to read paragraph 4 and then ask
13 him any questions that you would like to.
14 MR. THOMAS: That's fine. That's fine.
15 BY MR. THOMAS:
16 Q Take a look at paragraph 4 on the second
17 page of this document, Mr. Murray. Do you see the
18 last sentence of paragraph 4?
19 A Yes.
20 Q Does that refresh your recollection as
21 to whether Fairfax Water has stated to third-party
22 developers certain things about the City's water

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1 system?
2 A Yes.
3 Q And in what way does it refresh your
4 recollection, Mr. Murray?
5 A It's a statement that the City has
6 transferred revenues away from the water system to
7 the general fund.
8 Q Okay. Thank you. Now, Mr. Murray,
9 has -- what, if anything, has Fairfax Water done
10 to tell third parties that the City of Falls
11 Church may charge a differential rate for Fairfax
12 County customers versus City customers?
13 A Nothing.
14 Q Okay. Take a look, if you would, at the
15 paragraph right above the one that you just looked
16 at. Would you read that. You can read it to
17 yourself.
18 A "Although it's currently not doing so,
19 in the past the City has charged a higher rate to
20 its customers located in Fairfax County than to
21 its customers located in the City. There's
22 nothing to stop the City from returning to this

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1 practice."

2 Q So in fact the City has represented --

3 I'm sorry, Fairfax Water has represented to

4 third-party developers that the City may charge a

5 differential rate to Fairfax County customers,

6 right?

7 A Yes.

8 Q And the reason for representing that to

9 third-party developers is to dissuade them from

10 using the City's system, right?

11 A The entire purpose of this letter was to

12 lay out the pros of choosing Fairfax Water over

13 the City of Falls Church, as we were competing for

14 these customers.

15 Q And one of the cons that you indicated

16 to developers was that the City has in the past

17 charged a differential rate to -- or might charge

18 a differential rate to Fairfax County customers

19 versus City customers?

20 MR. RAPHAEL: Leading again, Your Honor.

21 THE COURT: I think the question was

22 fair.

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1 THE WITNESS: Yes.

2 BY MR. THOMAS:

3 Q All right. That's exactly what Fairfax

4 Water is recommending in this case, though, isn't

5 it, that the City charge a differential rate to

6 Fairfax County customers versus City of Falls

7 Church customers, right?

8 A No.

9 Q No? Okay.

10 MR. THOMAS: All right. I don't have

11 any further questions at this time, Judge.

12 THE COURT: All right. Do you have any

13 questions for Mr. Murray?

14 MR. RAPHAEL: I do, Your Honor. Thank

15 you.

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. RAPHAEL:

19 Q Good afternoon, Mr. Murray.

20 Mr. Thomas asked you some questions

21 about the 1959 agreement between Fairfax Water and

22 the City of Falls Church and about a lawsuit that

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1 was filed by the -- by Fairfax Water against Falls

2 Church prior to the time of that agreement.

3 Are you familiar with the provision that

4 used to be in the Virginia Water and Waste

5 Authorities Act that said that, if a -- that a

6 water authority could not duplicate the service

7 that was provided by another utility provider?

8 A Yes, sir.

9 Q Okay. And in 1959, was one of the

10 events that precipitated the lawsuit by Fairfax

11 Water against the City that the City expressed its

12 plans to extend a line along Gallows Road?

13 A Yes.

14 Q And is it your understanding that the

15 concern that Fairfax Water had about that was

16 that, if the City had done that, it would have

17 preempted Fairfax Water from providing water

18 service?

19 A Yes.

20 Q And is that why, to your understanding,

21 Fairfax Water filed the lawsuit?

22 A Yes.

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1 Q Okay. The 1959 agreement between

2 Fairfax Water and Falls Church provided, did it

3 not, that the City would sell water at cost to

4 Fairfax Water?

5 A Yes.

6 Q And was that a necessary water supply

7 for Fairfax Water at the time?

8 A Yes, it was.

9 Q The 1959 agreement established an

10 exclusive service area for both Fairfax Water and

11 as well as for the City of Falls Church, correct?

12 A Yes.

13 Q Okay. And by establishing an exclusive

14 service area for Falls Church, did it limit the

15 City's ability to expand further into Fairfax

16 County than the area set forth in the map

17 accompanying the agreement?

18 A Restate that. I'm not --

19 Q Yeah. The agreement set out an

20 exclusive service area.

21 A Yes.

22 Q Is it your understanding that that

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1 service area for Falls Church was less than the
2 area that Falls Church wanted to serve?
3 A Yes.
4 Q And by entering into the agreement, did
5 the agreement thereby limit the extent to which
6 Falls Church could expand its water service into
7 Fairfax County?
8 A Yes, it did.
9 Q Okay. And once the agreement was
10 entered into, the concern that Fairfax Water had
11 with regard to the City extending its lines
12 further into Fairfax Water -- into Fairfax County,
13 that concern at the time was resolved, correct?
14 A Yes, it was.
15 Q And as a result of that, am I correct
16 that the -- that Fairfax Water nonsuited and
17 dismissed without prejudice the lawsuit that it
18 filed against the City of Falls Church?
19 A Yes.
20 Q And then the agreement, the 1959
21 agreement remained in place for 30 years, right?
22 A Yes, it did.

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1 Q And a -- that was a period of peace and
2 tranquility between the City and Fairfax Water,
3 correct?
4 A Yes, it was.
5 Q All right. Mr. -- let me ask you this.
6 As part of the settlement agreement in 1959, are
7 you aware of any instance in which, as part of
8 that agreement, Fairfax Water agreed to waive its
9 legal right to challenge the City's water rates in
10 the future in perpetuity?
11 A No.
12 Q Have you seen any document remotely
13 resembling that?
14 A No, sir.
15 Q All right. Now, Mr. Thomas had asked
16 you some questions about when Fairfax Water moved
17 into its building, the Morin Building in the
18 1990s. Do you remember that line of questioning?
19 A Yes.
20 Q And he said, isn't it true the City
21 offered, he used the word "offered," the City
22 offered water service to Fairfax Water. Do you

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1 remember that question?
2 A Yes.
3 Q Okay. At the time, Mr. Murray, did the
4 City provide water service generally in the area
5 where the Morin Building was located?
6 A Yes.
7 MR. THOMAS: Objection, Your Honor.
8 Relevance.
9 THE COURT: Well, this subject was
10 raised with regard to the headquarters. It seems
11 to me it's perfectly legitimate to inquire as to
12 where it was going to get its water. Objection
13 overruled.
14 THE WITNESS: Yes.
15 BY MR. RAPHAEL:
16 Q Okay. And Mr. Thomas showed you an
17 exhibit referring to the availability fee and the
18 connection fees that were paid by Fairfax Water to
19 the City to connect to the system. Do you
20 remember that?
21 A Yes, sir.
22 Q And to the best of your knowledge,

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1 Mr. Murray, was the availability fee negotiated
2 between Fairfax Water and Falls Church, or was it
3 prescribed by a -- based on a published rate that
4 the City of Falls Church had?
5 MR. THOMAS: Objection, Your Honor. I
6 don't think there's any foundation as to whether
7 this witness would have any basis for knowing that
8 12 years ago. So foundation and relevance.
9 THE COURT: Well, he was asked about
10 events of 40 years ago. Ask him if he knows about
11 it.
12 MR. RAPHAEL: Yes.
13 BY MR. RAPHAEL:
14 Q Do you have a basis to know, Mr. Murray,
15 how the -- whether the availability fee that
16 Fairfax Water paid when it established water
17 service to the Morin Building was negotiated or
18 whether it was a tariff rate?
19 A It's my understanding it was a published
20 rate.
21 Q Right. You've never heard of any
22 instance in which that was negotiated between

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1 Fairfax Water and Falls Church, right?
2 A No.
3 MR. THOMAS: Objection. Calls for
4 hearsay, Judge.
5 THE COURT: Objection overruled.
6 THE WITNESS: No.
7 BY MR. RAPHAEL:
8 Q Okay. Mr. Thomas also showed you
9 Defendant's Exhibit 41, which was the easement
10 agreement between Fairfax Water and Falls Church.
11 A Yes.
12 Q Do you remember that?
13 A Yes, sir.
14 Q And Exhibit -- the easement agreement
15 contained in Defendant's Exhibit 41 allowed the
16 City to own the easement for the water lines that
17 connect to Fairfax Water's buildings, right?
18 A Yes.
19 Q And you testified when you were here in
20 our case in chief concerning your investigation in
21 2008 about whether Fairfax Water could connect to
22 the City's water system. Do you remember that

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1 questioning?
2 A Yes, sir.
3 Q And you mentioned your concern at the
4 time about an easement, the City's easement that
5 might have to be relocated as one of the obstacles
6 to making the change. Do you remember that?
7 A Yes.
8 Q Is this the easement that you were
9 referring to?
10 A Yes, sir.
11 Q Mr. Thomas asked you some questions
12 about Defense Exhibit 15, which was an April 15,
13 1985 settlement proposal from Fairfax Water and
14 Fairfax County to the City of Falls Church.
15 Did -- have you -- do you recall how many years it
16 took for the City to respond to that letter?
17 A I believe it was about 3 years.
18 Q Yes, sir. And after looking at the
19 offer for 3 years, that would take us to about
20 1988.
21 A Yes.
22 Q Did the City reject the offer?

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1 A Yes, they did.
2 Q Okay. And are you aware of any
3 discussions that occurred during that 3-year
4 period in which Fairfax Water said anything about
5 relinquishing its right forever to challenge any
6 future water charges by the City of Falls Church?
7 A No.
8 Q Okay. Mr. Sapp, would you please bring
9 up Plaintiff's Exhibit 3.6.
10 Plaintiff's Exhibit 3.6 is in evidence
11 and it reflects the return on investment as a
12 percentage of revenues. You know, I've got the
13 wrong one. Excuse me, Your Honor. 3.4.
14 Okay. I'm showing you Plaintiff's
15 Exhibit 3.4, which has been admitted into
16 evidence. And this reflects the amount of the
17 return on equity transferred from the water fund
18 to the general fund for the City of Falls Church.
19 Do you see that?
20 A Yes.
21 Q Okay. So in 1985, when the settlement
22 discussions began between Fairfax Water and Falls

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1 Church, Falls Church was transferring about
2 \$1.1 million -- between a million and a million 1
3 from the water fund to the general fund. Do you
4 see that?
5 A Yes.
6 MR. THOMAS: Just to object. I don't
7 think there's any foundation from this witness as
8 to his knowledge about the transfers that are
9 shown in this historic chart. The witness can
10 obviously read them, but I don't think there's any
11 basis for him to have personal knowledge about the
12 transfers that he's been asked about.
13 MR. RAPHAEL: Your Honor, this is fair
14 cross-examination. He was asked about his
15 knowledge of the transfers at the time.
16 THE COURT: Well --
17 MR. RAPHAEL: And this is in evidence.
18 THE COURT: This exhibit has been
19 entered into evidence. I mean, these figures are
20 no surprise to anyone. And Mr. Murray is being
21 asked to make some comments on them, not that he
22 personally prepared them or has examined them and

1 knows them to be absolutely accurate or anything
2 of the kind. I think it's proper. Objection
3 overruled.

4 BY MR. RAPHAEL:

5 Q Okay. So between 1985 and 1988, the
6 return on investment was in the neighborhood of a
7 million dollars a year, right?

8 A Yes.

9 Q Okay. And the -- and then after -- are
10 you aware that the City's charter was amended
11 between 1992 and 1995?

12 A Yes.

13 Q Okay. And so let's look to the period
14 after 1995.

15 Ken, would you bring up 3.6 now.

16 Okay. So after the charter was amended
17 and we get to the period fiscal year 2000 for the
18 City, the rate of return that the City was taking
19 went up -- began going up, didn't it?

20 A Yes.

21 Q And in fact it peaked in the year -- in
22 the City's fiscal year 2002, correct?

1 A Yes.

2 Q Okay. And that was after the settlement
3 discussions you had between 1985 and 1988?

4 A Yes, sir.

5 Q Now, in 1995, Mr. Murray, did the
6 Washington Aqueduct ask Fairfax Water if it was
7 interested in acquiring the Aqueduct's water
8 system?

9 MR. THOMAS: Objection, Judge. Beyond
10 the scope of my examination.

11 MR. RAPHAEL: I can connect it up, Your
12 Honor.

13 THE COURT: Pardon?

14 MR. RAPHAEL: I can connect this up,
15 Your Honor.

16 THE COURT: All right. I'll permit it.

17 THE WITNESS: Yes.

18 BY MR. RAPHAEL:

19 Q And the Aqueduct is the water supplier
20 for the City of Falls Church, is it not?

21 A Yes.

22 Q And it's also the water supplier for

1 Arlington County and the District of Columbia?

2 A Yes.

3 Q Did the Aqueduct inquire if Fairfax
4 Water was interested in taking over the entire
5 Aqueduct operation?

6 A I believe so.

7 Q All right. And what would that have
8 meant with regard to who was providing water
9 service to the City of Falls Church if that had
10 happened?

11 A It would have fundamentally changed our
12 relationship with the City. We would have become
13 the wholesale supplier for the City of Falls
14 Church.

15 Q Okay. And then in 1996, Congress
16 enacted legislation, did it not, asking the
17 Aqueduct to investigate the possibility of selling
18 the system?

19 A Yes.

20 Q And what did Fairfax Water do in
21 response to that inquiry?

22 A Did a pretty thorough evaluation of the

1 engineering and financial considerations having to
2 do with taking the Aqueduct.

3 Q All right. Did -- at some point
4 thereafter, did the City of Falls Church and the
5 other wholesale customers of the Aqueduct take a
6 position that they were opposed to the Aqueduct
7 selling the water system?

8 MR. THOMAS: Judge, if I could,
9 relevance and beyond the scope. I think there was
10 some promise to connect it back up, and I don't
11 think -- perhaps I'm impatient and we haven't
12 gotten there. But I don't think this is relevant.
13 And I do think it is beyond the scope of my
14 examination.

15 THE COURT: Mr. Raphael.

16 MR. RAPHAEL: Your Honor, number 1, I
17 had objected to getting into any of this material
18 because it wasn't in their interrogatory answer.

19 THE COURT: Right.

20 MR. RAPHAEL: But we're past that now.

21 THE COURT: Right.

22 MR. RAPHAEL: I'm hopeful the Court will

1 respect my standing objection on that.
 2 THE COURT: Of course.
 3 MR. RAPHAEL: The reason this is
 4 relevant, Your Honor, is because they're arguing
 5 Fairfax Water delayed in bringing the action. And
 6 I'm demonstrating here what was going on as to why
 7 it wouldn't have made any sense for this action to
 8 have been brought at an earlier time. And the
 9 fact, for example, that Fairfax Water was being
 10 asked to take over the City's water system
 11 supplier is directly relevant to that.
 12 THE COURT: Well, frankly, I've rarely
 13 seen a case where there have been so many
 14 objections from both sides where there is -- if
 15 there are any factual disputes existing, I'm
 16 unaware of them. Honestly, I think two excellent,
 17 highly skilled lawyers, and making terrific
 18 objections, but it doesn't really make any
 19 difference. It just really doesn't make any
 20 difference. The ultimate issue in this case still
 21 has not changed.
 22 And I just -- I just think it would be

1 more efficient, unless some smoking gun shows up,
 2 which is very unlikely, to permit testimony in an
 3 area such as this which is of somewhat of a
 4 historical nature.
 5 I'm going to permit it. Objection
 6 overruled.
 7 MR. RAPHAEL: Would you read back the
 8 last question, please.
 9 (The reporter read the record as
 10 requested.)
 11 THE WITNESS: That's my understanding.
 12 BY MR. RAPHAEL:
 13 Q Now, in 1997, was there a dispute
 14 between Maryland and Fairfax Water and the
 15 Commonwealth of Virginia over Fairfax Water's
 16 rights of access to the Potomac River?
 17 A Yes.
 18 Q And Fairfax Water had, at that time, was
 19 operating an intake -- water intake structure on
 20 the shore of the Potomac River, correct?
 21 A Yes.
 22 Q And it wanted to build an offshore

1 intake in the channel of the river to obtain water
 2 of greater water quality, right?
 3 A That's correct.
 4 Q Did Maryland oppose that project?
 5 A Yes. They denied the issuance of a
 6 permit for construction.
 7 Q And did the issue become politically
 8 messy in Maryland and in Virginia?
 9 A It did, indeed.
 10 Q And describe how that happened.
 11 MR. THOMAS: Judge, I'm sorry. If I
 12 could, I'm going to object to relevance. And I'll
 13 sit down. But if I could have a continuing
 14 objection.
 15 THE COURT: I don't mind you making the
 16 objections. I mean, I just -- I just wonder how
 17 efficient it is for the Court having to rule on
 18 this one and that one. They might all be well
 19 taken, but they don't make any much difference.
 20 I'm going to permit it. Objection overruled.
 21 THE WITNESS: Well, the Maryland
 22 Department of the Environment refused the permit.

1 Fairfax Water appealed the permit denial. And it
 2 became quite contentious between the State of
 3 Maryland and the State of Virginia. Marylanders
 4 and various elected officials, including the
 5 governor, felt it was a water grab by the State of
 6 Virginia.
 7 BY MR. RAPHAEL:
 8 Q Governor of Maryland.
 9 A Governor of Maryland. I'm sorry. And
 10 so a certain amount of political influence was
 11 exercised in Maryland. The permit was finally
 12 denied, and a lawsuit ensued.
 13 Q Okay. Now, up until that time, Fairfax
 14 Water had a water appropriation permit from the
 15 Maryland Department of the Environment, correct?
 16 A That is correct.
 17 Q And when Fairfax Water would issue
 18 revenue bonds, it would have to include the
 19 Maryland permit as part of the revenue bonds to
 20 show that it had a legal right to access the
 21 Potomac River, correct?
 22 A That's correct.

1 Q And as part of the dispute involving the
2 offshore intake, am I correct that Maryland
3 officials indicated that Maryland should take
4 steps to restrict growth in Virginia by limiting
5 the amount of water that Fairfax Water could
6 withdraw?

7 A Yes.

8 Q Now, if Maryland had blocked Fairfax
9 Water's access to the Potomac River, what other
10 water resource did Fairfax Water have?

11 MR. THOMAS: Objection, Judge. Calls
12 for speculation.

13 THE COURT: I think that's a well taken
14 objection. Sustained.

15 MR. RAPHAEL: Let me see if I can lay a
16 foundation for it.

17 BY MR. RAPHAEL:

18 Q Fairfax Water currently draws water from
19 what sources, Mr. Murray?

20 A Potomac River and the Occoquan.

21 Q And you're aware, are you not, that
22 Fairfax Water considered what alternatives it

1 would have in the event Maryland blocked its
2 access to the Potomac River?

3 A Yes.

4 Q All right. What were those
5 alternatives?

6 A Well, we'd probably have to rely on the
7 Washington Aqueduct as a supplier.

8 Q And would that have meant potentially
9 either building a line directly to the Aqueduct or
10 buying it from Falls Church?

11 A Yes.

12 Q Okay. Now, what happened next in the
13 dispute between Virginia and Maryland and Fairfax
14 Water? You talked about the permit situation.

15 A Yeah. A suit was filed by Virginia in
16 the U.S. Supreme Court. The case was argued
17 before the Court in 2003.

18 Q All right. That case was filed in the
19 year 2000, right?

20 A Yes.

21 Q And it was decided in December of 2003?

22 A That's correct.

1 Q And the Court in December of 2003 ruled
2 that Maryland could not control Virginia's rights
3 of access to the Potomac River?

4 A That is correct.

5 Q Now, the end of 2003 is right about the
6 time you came to work for Fairfax Water, correct?

7 A That is right.

8 Q And I should ask you, were you familiar
9 with the Virginia/Maryland dispute because of your
10 service at the WSSC before you got to Fairfax
11 Water?

12 A Yeah, very much so. In fact, we were
13 contemplating a very similar offshore intake for
14 the WSSC plant on the Potomac River. So I was
15 very much involved and interested in the outcome
16 of that dispute.

17 Q Okay. So now you've arrived at Fairfax
18 Water at the end of 2003. One of the first things
19 I think you did was to go watch the --

20 A Yes.

21 Q -- oral argument in the Supreme Court;
22 is that right?

1 A Yes, I did.

2 Q You were a guest of the Commonwealth of
3 Virginia?

4 A Yes, I was.

5 Q At the time you arrived at Fairfax
6 Water, what was your title?

7 A Executive Officer.

8 Q And then you went on to become the
9 general manager?

10 A Yes.

11 Q What was the status at the time you
12 arrived at Fairfax Water of efforts by Fairfax
13 Water to negotiate with the City of Falls Church
14 some kind of long-term solution to the conflicts
15 that had existed?

16 A Well, shortly after I got there, I don't
17 recall the exact dates, but there were attempts by
18 our board to make contact with elected officials
19 in the City of Falls Church in order to initiate a
20 dialogue on some sort of negotiated resolution.

21 Subsequent to that, I became involved at
22 the staff level with the City Manager.

1 Q All right. Let me show you a document,
2 Your Honor, that I've had marked as Plaintiff's
3 Rebuttal Exhibit 26.

4 Can you bring up, Mr. Sapp, Plaintiff's
5 Exhibit 26.

6 And I have a copy both for the Court and
7 for the witness.

8 THE COURT: Thank you.

9 BY MR. RAPHAEL:

10 Q Do you recognize Plaintiff's Rebuttal
11 Exhibit 26, Mr. Murray?

12 A Yes, sir.

13 Q What is it?

14 MR. THOMAS: Objection, Judge. It is
15 hearsay. And my objection is based on that.

16 MR. RAPHAEL: Yeah, I'm not offering it
17 for the truth of any of the material in here. I'm
18 offering it to show that, at this time, there were
19 discussions ongoing about purchasing the water
20 system. That's offered to show a place in time,
21 not the truth of any of the things in here as to
22 whether one option or the other is better, just

1 that there were discussions ongoing.

2 MR. THOMAS: I'm sorry, Judge, but I
3 think that's precisely what this document
4 indicates. And so I do think he is offering it
5 for the truth.

6 THE COURT: This was authored by
7 Mr. Murray?

8 MR. THOMAS: It was.

9 THE COURT: He can -- he can refer to
10 it. You can cross-examine him about it.
11 Objection overruled.

12 MR. RAPHAEL: Thank you, Your Honor.
13 BY MR. RAPHAEL:

14 Q Mr. Murray, what does -- what did you --
15 what were you trying to do in November of 2005
16 with regard to consideration of options for the
17 Falls Church system?

18 A What was I trying to do with this E-mail
19 or --

20 Q Yes. No, at this time, what was
21 happening in terms of what you were -- you talked
22 about when you arrived at Fairfax Water the state

1 of negotiations or discussions with Falls Church.
2 I'm trying to flesh that out a little bit.

3 A Yes.

4 Q What were you doing at the time?

5 A I had had a few meetings with the City
6 Manager where we were slowly but surely making
7 progress in terms of how we would frame up
8 discussions about the potential for some sort of
9 negotiated resolution.

10 And at a meeting sometime just before
11 November 7th, 2005, we came to these four
12 alternatives as something that would be worthy of
13 further study and evaluation.

14 Q All right. And what were the four
15 alternatives that you and the City Manager -- let
16 me back up. Was the City Manager Dan McKeever at
17 the time?

18 A Yes, it was.

19 Q All right. What were the four
20 alternatives that you and the City Manager
21 discussed as worthy of further consideration?

22 A As you can see, no action, which is

1 necessary to just kind of have a baseline.

2 What we were terming at the time a
3 complete asset sale. Fairfax Water would purchase
4 all of the Falls Church system and become the
5 retail provider for all the customers in the
6 existing service area.

7 A partial asset sale, where the City
8 would sell the system outside the City boundary
9 and retain ownership within the City.

10 And then a redefinition of the service
11 area, redrawing of the service areas. And you can
12 see we had a general idea what that redrawing of
13 the service area would look like.

14 Q And am I correct that these are ideas
15 that Dan McKeever said he thought were worthy of
16 further investigation?

17 A Yeah. I think -- you know, it took
18 several meetings to get us to this point where we
19 would agree that there were some things worth
20 further discussion. And I was trying to capture
21 that for the staff within Fairfax Water.

22 Q And were you trying to report to your

1 subordinates in the ordinary course what the
 2 status or the state of play was in terms of your
 3 negotiations --
 4 A Yes.
 5 Q -- and discussions with the City?
 6 A Exactly.
 7 MR. RAPHAEL: I would move Plaintiff's
 8 Rebuttal Exhibit 26.
 9 MR. THOMAS: Subject to my hearsay
 10 objection, Your Honor.
 11 THE COURT: All right. It will be
 12 received.
 13 (Plaintiff's Rebuttal Exhibit 26 was
 14 received into evidence.)
 15 MR. RAPHAEL: Thank you, Your Honor.
 16 BY MR. RAPHAEL:
 17 Q All right. Now, let's -- we're in the
 18 fall of 2005 here. Let's fast-forward to the
 19 summer of 2006. Did Dan McKeever pass away?
 20 A Yes.
 21 Q All right. What effect did that have on
 22 your -- just a minute.

1 When Mr. McKeever passed away in the
 2 summer of 2006, what effect did that have on the
 3 discussions between Fairfax Water and the City
 4 concerning possible new arrangements regarding
 5 their relationship?
 6 A Put a complete stop to the discussions.
 7 Q Okay. At some point, were you able to
 8 get them started up again, the discussions?
 9 A Yes. The City named Wyatt Shields as
 10 acting City Manager. I don't recall exactly when.
 11 But once that action was taken, we renewed contact
 12 and initiated a few meetings between myself and
 13 Wyatt Shields.
 14 Q All right. Was one of the -- in the
 15 middle of 2006, did Fairfax Water have a new
 16 chairman?
 17 A Yes.
 18 Q And who was that?
 19 A Mr. Allin.
 20 Q Mr. Allin. Did Mr. Allin replace
 21 Mr. Day?
 22 A Yes, sir.

1 Q And that was roughly in the fall of
 2 2006, correct?
 3 A Yes.
 4 Q All right. And then did Mr. Allin write
 5 a letter to the Mayor of Falls Church in an effort
 6 to try to jump-start the negotiations following
 7 Mr. McKeever's death?
 8 MR. THOMAS: Objection. Hearsay, Judge.
 9 THE COURT: Well, I haven't seen it
 10 yet --
 11 THE WITNESS: Yes, he did.
 12 THE COURT: -- the answer to that
 13 question.
 14 THE WITNESS: Oh, I'm sorry.
 15 BY MR. RAPHAEL:
 16 Q Now, Mr. Thomas showed you Defendant's
 17 Exhibit 37. Ken, can we bring that up on the
 18 screen, please.
 19 This was your E-mail of December 19th,
 20 2006. And you had a -- you had a draft agenda
 21 attached to this.
 22 Ken, can you go to the second page,

1 please.
 2 Okay. Was one of the ideas that you
 3 were still considering at this time a purchase of
 4 the Falls Church Water system?
 5 A Yes.
 6 Q And that's as of December of 2006,
 7 right?
 8 A Yes.
 9 Q And at that point the City had not said
 10 to you no way, no how, won't happen?
 11 A No.
 12 Q Okay. Were you still trying to reach a
 13 negotiated solution with Falls Church as of
 14 December of 2006?
 15 A Absolutely.
 16 Q And were you anticipating following this
 17 E-mail and this -- your suggestion for a meeting
 18 here, were you anticipating further meetings with
 19 the City of Falls Church?
 20 A Yes.
 21 Q And did you subsequently receive a
 22 letter from Mayor Gardner, the Mayor of the City

1 of Falls Church, stating that, in January of 2007,
2 that the City was no longer interested in selling
3 its water system to Fairfax Water?

4 A Yes.

5 Q And a month later, in February of 2007,
6 what happened?

7 A The City filed suit in federal court
8 against Fairfax Water.

9 Q And what -- is that the suit where the
10 City was seeking an exclusive federal service
11 area?

12 A Yes, sir.

13 Q Okay. And the federal suit was decided
14 against the City in May of 2007, correct?

15 A Correct.

16 Q And then finally decided by the Court of
17 Appeals in April of 2008; is that right?

18 A That's correct.

19 Q And that takes us back to what you
20 testified about on your -- in our case in chief
21 about your efforts in May of 2008 to look at the
22 possibilities of connecting to the Fairfax Water

1 system for the Fairfax Water buildings rather than
2 the City system, right?

3 A Yes.

4 MR. RAPHAEL: That's all I have, Your
5 Honor. Thank you.

6 THE COURT: All right. Thank you.
7 Redirect?

8 MR. THOMAS: Yes, sir, very briefly.

9 THE COURT: Yes, sir.

10 REDIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Murray, as of January of 2009 when
13 this claim was brought, Falls Church provided
14 service to Fairfax Water, right?

15 A Yes.

16 Q And that was true also in the spring of
17 2007 when the City of Falls Church filed the
18 lawsuit you were just asked about against Fairfax
19 Water, right?

20 A I'm sorry. I don't -- I'm not making a
21 connection.

22 Q Fairfax Water was a customer of the City

1 of Falls Church when Falls Church sued --

2 A Yes.

3 Q -- Fairfax Water, right?

4 A Yes.

5 Q In 2007?

6 A Right.

7 Q And Fairfax Water and Falls Church had a
8 customer relationship as of the date of the
9 Exhibit 15 that I asked you about, which was your
10 E-mail to Mr. Wyatt Shields of December of 2006,
11 right?

12 A Yes.

13 Q And it had a customer relationship as of
14 the date of Plaintiff's Rebuttal Exhibit 26, which
15 is about a year before that time, in November of
16 2005, right?

17 A Yes.

18 Q And in fact Falls Church has provided
19 service to Fairfax Water at the P&E building going
20 back more than 30 years, right?

21 A Late '70s, yes.

22 Q All right. And at the Morin Building

1 location since 1997, right?

2 A Yes.

3 Q All right.

4 MR. THOMAS: Your Honor, I would like to
5 move in Exhibit 37, which was the document I just
6 talked to Mr. Murray about, Defendant's
7 Exhibit 37.

8 THE COURT: Do you have an objection?

9 MR. RAPHAEL: Just my standing objection
10 that this entire line of inquiry was not disclosed
11 in discovery and response to interrogatories.

12 THE COURT: All right. It will be
13 received subject to that objection.

14 (Defendant's Exhibit 37 was received
15 into evidence.)

16 MR. THOMAS: Thank you, Judge. I don't
17 have any further questions at this time.

18 THE COURT: Thank you. Thank you,
19 Mr. Thomas.

20 Mr. Murray, I thank you, sir. You may
21 step down again.

22 Why don't we take a couple minutes

1 before we call the next witness. The Court will
2 be in recess.

3 (Whereupon, a recess was taken between
4 3:00 p.m. and 3:17 p.m.)

5 THE COURT: All right, Mr. Thomas.

6 MR. THOMAS: Thank you, Judge.

7 The City calls John Tuohy.

8 Whereupon,

9 JOHN TUOHY

10 was called as a witness, and, having first been
11 duly sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. THOMAS:

14 Q Good afternoon, Mr. Tuohy. Would you
15 state your name, please.

16 A Certainly. My name is John H. Tuohy.

17 Tuohy is spelled T-U-O-H-Y.

18 Q And how are you employed, Mr. Tuohy?

19 A I'm the Chief Financial Officer for the
20 City of Falls Church.

21 Q All right. Would you give the Judge
22 just a very brief description of your educational

1 background.

2 A Certainly. I have a bachelor's degree
3 in foreign service from Georgetown University and
4 a master's degree in accountancy also from
5 Georgetown University.

6 In addition, of course, as a certified
7 public account in the Commonwealth of Virginia,
8 I'm required 40 hours of education a year.

9 Q All right. And for how long have you
10 been a CPA in Virginia?

11 A I got my Virginia license in 1987. I
12 was actually passed the exam in Maryland in 1984.

13 Q Other than your current position,
14 Mr. Tuohy, what experience, do you have in
15 Virginia state and local government finance?

16 A I have an aggregate of 23 years
17 experience.

18 My first local government job was as
19 deputy treasurer for Arlington County. That
20 started in 1986.

21 Subsequent to that, I worked as the
22 deputy auditor to the Board of Supervisors in

1 Fairfax County. Then I became the director of
2 finance for Fauquier County schools and general
3 government. Then I was Chief Financial Officer
4 for the Virginia Railway Express. And then
5 5 years ago, I became the Chief Financial Officer
6 for the City of Falls Church.

7 Q All right. Thank you. What is a CAFR?

8 A CAFR stands for Comprehensive Annual
9 Financial Report. This is the annual financial
10 report that the City has done. And there's
11 actually a whole series of professional standards
12 that define CAFRs.

13 It's essentially something over and
14 above the audited financial statements. It
15 requires a lot of other ancillary information.

16 Q How many CAFRs have you worked on in
17 your career, Mr. Tuohy?

18 A About 20.

19 Q What is a proprietary fund in government
20 accounting?

21 A Proprietary fund -- first of all, let me
22 define the word "fund" because I know we've had a

1 lot of discussion about that.

2 A fund is --

3 MR. RAPHAEL: Your Honor, I'm sorry to
4 rise at this point.

5 But I'd like to note an objection that I
6 don't have any quarrel with this witness talking
7 about what he's done as the CFO for Falls Church.
8 But it's starting to sound like an expert
9 interrogation, and he's not been identified as an
10 expert witness.

11 THE COURT: Well, at this point, it
12 seems to me it sounds to be a discussion of the
13 kinds of matters with which he would have
14 familiarity because of his position, not simply
15 his experience, but his position. A CAFR, for
16 example.

17 So we'll see where we're going to go.

18 MR. RAPHAEL: And then that's fair. I
19 just want to make sure I don't open the door to
20 expert testimony coming in that's not properly
21 identified or disclosed.

22 THE COURT: So far so good.

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1 MR. RAPHAEL: Thank you, Judge.
2 MR. THOMAS: Thank you, Judge.
3 THE WITNESS: Okay. Anyway, definition
4 of a fund is a self-balancing set of accounts
5 within a larger entity; in this case, the City of
6 Falls Church.
7 Funds fall into a couple of different
8 categories. Proprietary funds that are funds
9 described, particularly under GASB 34, which is
10 what we use right now, as businesslike activities.
11 Proprietary funds are then further
12 subdivided into internal service funds, which are
13 business-type activities, that serve the internal
14 service funds -- that serve internal customers.
15 And then enterprise funds. Enterprise
16 funds are designed to serve customers, if you
17 will, external to the government, you know.
18 Classic example is water and sewer
19 funds, electric funds. Hospitals are oftentimes
20 under the enterprise funds. Airports. Parks and
21 recreation sometimes is run as an enterprise fund.
22 Landfills are another one. There's a whole

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1 variety. But it's where the government is
2 essentially taking on a business.
3 BY MR. THOMAS:
4 Q All right. And what is general fund?
5 A The general fund is a fund that's used
6 to account for -- is actually kind of a general
7 definition. Everything that's not accounted for
8 in other funds.
9 So it's the bulk of the activity in any
10 particular governmental entity.
11 Q Okay. Now, when you started your
12 position as CFO for the City, were you aware that
13 the City operated a water system?
14 A Yes.
15 Q All right. And what, if anything, did
16 you do to understand the finances of the water
17 system when you started?
18 A I made inquiries to see how it ran. I
19 looked into the financial statements, you know,
20 tried to familiarize myself with the operations of
21 the City.
22 Q And what was your understanding, if

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1 anything, of how the City establishes water rates?
2 A The City's water rates are established
3 as part of the annual budgetary process.
4 And so my understanding -- and, again, I
5 made some inquiries to this -- is we essentially
6 just took revenues and expenditures, and that
7 created the water rates.
8 We did have a number of studies done on
9 that. And I don't know if you want to get into
10 that yet or not.
11 Q Well, that's fine. What was your
12 understanding of how the City calculated ROI, or
13 return on equity?
14 THE COURT: Hang on.
15 MR. RAPHAEL: Your Honor, to the extent
16 this gentleman wasn't there at the time and
17 anything he knows based on his past studies is
18 something he was told or read, it's hearsay and
19 it's improper foundation.
20 THE COURT: All right. Let's just see
21 where we go. I haven't heard anything troublesome
22 yet.

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1 Go ahead, Mr. Thomas.
2 MR. THOMAS: Thank you.
3 BY MR. THOMAS:
4 Q What was your understanding of how the
5 City calculated a return on equity for the water
6 system?
7 A My understanding is it was done on what
8 we call an asset-based mechanism. We had a
9 process for doing that.
10 Q Can you explain to the Court what you
11 mean by asset-based mechanism.
12 A What we do is we took a look at the
13 assets that the City owned. And then there was a
14 return on investment based on those values of the
15 assets where an imputed interest rate was placed
16 against that.
17 Q Okay. Now, what -- why did the City
18 take a return on investment in the water system?
19 MR. RAPHAEL: Objection to the extent
20 that this is calling for this witness to talk
21 about why the City Council did something. He
22 hasn't laid a foundation for that.

1 There's been a lot of objections in this
2 case about the motive or purpose behind what --
3 for why the City Council acted. He just hasn't
4 established a foundation for that here, I believe,
5 Your Honor. I object.

6 THE COURT: Well, we know that's the
7 case. We know that's what's done.

8 Why don't you perhaps focus on
9 Mr. Tuohy's knowledge of the fact and how that
10 went into putting together the budgets. How's
11 that?

12 MR. THOMAS: Thank you.

13 BY MR. THOMAS:

14 Q Mr. Tuohy, when you became the CFO for
15 the City, what role did the return on equity from
16 the water system have in the City's budgeting
17 process?

18 A The return on equity in the water system
19 is one of a number of different revenue sources
20 that we use in creating the budget. In other
21 words, I don't know if this is the time to get
22 into it or not.

1 Can I give sort of a little synopsis of
2 how the budget process works, if that would be
3 helpful to the Court?

4 THE COURT: I'm sorry?

5 THE WITNESS: Would it be helpful if I
6 gave sort of a one-minute cook's tour of the
7 budget process that might put this in context?

8 THE COURT: Do you have an objection to
9 that?

10 MR. RAPHAEL: Just to the extent it's
11 calling for a narrative. I think the witness --

12 THE COURT: It's on this going to be a
13 one-minute narrative.

14 MR. THOMAS: Pretty short narrative.

15 MR. RAPHAEL: It's supposed to proceed
16 by question and answer and not, "Here is
17 everything I know about this subject."

18 THE COURT: Well, he's just using it as
19 an example. I think it's fine, Mr. Tuohy.

20 THE WITNESS: Essentially what happens
21 is, when we develop the annual budget, we do a
22 number of estimates at the beginning of the

1 process for revenues. So, you know, so much for
2 sales tax, so much for this tax, that tax, that
3 kind of thing, fees, fines. Return on investment
4 is one of those estimates we do.

5 Separate from that, we do a series of
6 estimates on expenditures. You know, health
7 insurance can go up so much, salaries can go up so
8 much, that kind of thing.

9 So now we have your list of revenues and
10 list of expenditures. The bottom never equals.
11 Revenues may be higher than expenditures, may be
12 lower than expenditures.

13 And that's when we then have to take a
14 look at either tax rates or reducing expenditures
15 to make the two meet.

16 So the return on investment is done at
17 the beginning of the process in order to come up
18 with this accumulation of revenues to fund
19 governmental activities.

20 Was that less than a minute?

21 THE COURT: Yes, sir.

22 THE WITNESS: Thank you. Okay.

1 BY MR. THOMAS:

2 Q All right. Mr. Tuohy, based on your
3 experience and your role, why is a return on
4 equity from the water system included among the
5 revenues?

6 A Well, there's a couple reasons why.

7 One, of course, it is specifically
8 allowed to us by the City charter. So it speaks
9 to the fact that we can take a return on
10 investment.

11 The other thing, of course, is that
12 the -- were you going to say something?

13 Q No. I'm listening to you.

14 A Oh, I'm sorry.

15 The other thing is you take a look at
16 it, and you can see that this is essentially a
17 recompense for the risk that the citizens of the
18 City take for operating this businesslike
19 activity.

20 Q Can you explain to the Court what you
21 mean by "risk."

22 A Certainly. When I talk about risk, what

1 I'm talking about is the citizens of the City, the
2 11,000 owners, if you will, stockholders of the
3 system, assume a couple different kinds of risk.
4 And you can subdivide them into two. One is event
5 risk, and one is, I'll call it, default risk.

6 Event risk is if something catastrophic
7 happens to the system: A major water main break,
8 a pump station breaks, a tank explodes, something
9 like that. It's necessary virtually
10 instantaneously to correct that issue regardless
11 of the assets available to the water fund.

12 So if we had to borrow money, let's say,
13 from the general fund in order to fix a water tank
14 that exploded, that has to be done. We operate
15 the system and we obviously want to continue to
16 provide water to all of our customers. So that's
17 event risk. Something sudden catastrophic can
18 occur.

19 Default risk is the fact that we issue
20 general obligation bonds in which we pledge any
21 and all revenues available to the City for the
22 repayment of these debts.

1 If for some reason there is insufficient
2 revenue of the water fund in any given year to
3 repay that debt, the City stands behind the bonds
4 with -- when I say any and all, that means we
5 could increase taxes, increase fees, reduce
6 expenses, whatever it takes to make that bond
7 good.

8 That is done -- there's a couple of good
9 reasons. But the major reason is it saves us
10 money. Since we're pledging something more than
11 the revenue stream from the water fund, we're
12 actually pledging everything, we get a better
13 rate. Of course, that redows to the benefit of
14 all of our ratepayers.

15 Q Thank you. Does the City -- let me ask
16 you this: What, if any, general obligation bond
17 financing has the City incurred associated with
18 the water system?

19 MR. RAPHAEL: Can I just clarify. Is
20 this during the time Mr. Tuohy has been there or
21 before he had arrived?

22 THE COURT: Mr. Thomas.

1 MR. THOMAS: I'll start with the time
2 he's been there.

3 BY MR. THOMAS:

4 Q As of today, Mr. Tuohy, what, if any,
5 general obligation bond financing is associated
6 with the water system?

7 A We currently have \$17,500,000 of
8 outstanding, all of which was issued during my
9 tenure.

10 Q All right. And can you, in rough terms,
11 attribute that general obligation fund financing
12 with particular projects?

13 A Yes.

14 Q All right. Would you just briefly do
15 so.

16 A There's a number of major projects. One
17 of them, and this came up the other day, is the
18 residuals project. This is something that was
19 done in -- as an environmental issue for the
20 Washington Aqueduct.

21 Another major project was part of our
22 Tysons Corner project. It was building a pump

1 station at Scotts Run.

2 We are currently undertaking a major
3 water main replacement and expansion project
4 around -- down Route 50, Arlington Boulevard.
5 That's about \$3-1/2 million.

6 We also borrowed money for what's called
7 the AMR, automated meter reading project, which is
8 a project that allows us to put radio transponders
9 into people's water meters so you don't have to
10 read them manually. You can just drive by and
11 read them.

12 And then there's a number of sort of
13 ancillary projects all related to distribution or,
14 you know, enhancements to the system.

15 Q Now, how does the City pay for the debt
16 service on those bonds?

17 A We budget the debt service in the water
18 fund. So the intent is that the debt service
19 would be repaid through the monies collected in
20 the fund.

21 Q All right. Who is liable for -- who is
22 liable for the obligation?

1 A The liability is specifically on the
 2 City itself. It is, as I explained, a general
 3 obligation. So the City Council has committed
 4 themselves to any and all funds available to the
 5 City to make sure they are repaid.
 6 Q All right. What, if any, relationship
 7 is there, Mr. Tuohy, between the risk that you
 8 described and the City's return on investment or
 9 return on equity?
 10 A Well, there's an absolute relationship
 11 there. It's sort of basic finance. Any time you
 12 assume a risk, you need to get some reward. And
 13 obviously you need to balance the risk versus the
 14 reward.
 15 Something extraordinarily risky, you get
 16 an extraordinarily high reward. Something
 17 relatively safe such as a general obligation bond
 18 for the City of Falls Church, you have a
 19 relatively low reward.
 20 Event risk, of course, is another thing
 21 you look at and see, you know, the likelihood of a
 22 an event. And they happen. It's just -- you

1 can't run a huge system and not have things
 2 happen.
 3 Q Okay. You mentioned a moment ago
 4 certain studies that the City has received on its
 5 rates and its transfer policy to the general fund.
 6 Approximately how many do you have in
 7 mind?
 8 A I want to say eight. Do you mind if I
 9 name them? Maybe I can count them up.
 10 Q Go right ahead.
 11 A Okay. There was one done in 1984 by
 12 Malcolm Pirnie.
 13 MR. RAPHAEL: Your Honor, if I may renew
 14 my standing objection with regard to studies that
 15 the City may have done in the past isn't relevant
 16 to any kind of -- there's no good faith defense
 17 here.
 18 THE COURT: I understand. I understand.
 19 I'm going to permit it. It's just a
 20 little bit of history.
 21 BY MR. THOMAS:
 22 Q Okay. Thank you.

1 Go ahead.
 2 A And I may not have these in strict
 3 chronological order, if you don't mind.
 4 But we did one with Malcolm Pirnie;
 5 Robinson, Farmer and Cox; Black & Veatch;
 6 Government Finance Group; Craigie, Incorporated;
 7 Camp Dresser McKee; KPMG; and PJ Son. I think
 8 that adds up to eight, but....
 9 Q Now, do you know why the City conducted
 10 all these analyses regarding its water rates and
 11 its transfers?
 12 MR. RAPHAEL: I object. It calls for
 13 speculation.
 14 He's just named a bunch of studies that
 15 were done well before he even arrived. I don't
 16 think he's competent to say why the City Council
 17 did something before he got there.
 18 THE COURT: Were all those before he
 19 arrived? Didn't some overlap when he was there?
 20 MR. RAPHAEL: I believe they all were
 21 before except PJ Son.
 22 MR. THOMAS: That's correct. Judge, if

1 I could, we just had testimony from Mr. Murray who
 2 admittedly arrived in 2003 --
 3 THE COURT: I'm going to permit it.
 4 MR. THOMAS: Thank you.
 5 MR. RAPHAEL: The difference is they
 6 opened the door on that. I'm just trying to keep
 7 this out. It's not apples and apples.
 8 THE COURT: Well, we've already made a
 9 distinction between doing studies and acting upon
 10 them as opposed to permitting the details of the
 11 studies being admitted into evidence because of
 12 the series of objections which were sustained.
 13 MR. RAPHAEL: Yes.
 14 THE COURT: And I just see this falling
 15 into the former category --
 16 MR. RAPHAEL: All right.
 17 THE COURT: -- at this point.
 18 Objection overruled.
 19 MR. THOMAS: Thank you, Judge.
 20 THE WITNESS: Okay. Could you ask the
 21 question again.
 22 BY MR. THOMAS:

1 Q Sure. Why did the City conduct all
2 these analyses regarding its water rates and
3 transfers to the general fund?

4 A It's generally best practice
5 periodically to have somebody come in and take a
6 look at what you're doing, particularly if the
7 whatever it is you're doing is fairly specialized.

8 So, for example, doing water utility
9 rate studies, it's a very specialized field. So
10 having someone come in periodically and do, if you
11 will, a recheck. You may end up with the answer
12 that everything's okay. But, you know,
13 nevertheless it's best practice to do that.

14 Q Now, what --

15 MR. RAPHAEL: I am sorry, Your Honor. I
16 have to renew my objection. He's implying that
17 all of these studies approve what the City is
18 doing, and that necessarily gets into what the
19 studies may or may not have said.

20 THE COURT: Well, I didn't take that
21 way, though, Mr. Raphael. I took it that way that
22 the practice is to get these studies to see if

1 you're doing okay. And if you're not, it'll blow
2 up on you.

3 I mean, we all know that every
4 municipality does this.

5 MR. RAPHAEL: Right.

6 THE COURT: And we all know that if all
7 these studies came in and blessed Falls Church's
8 method of doing this, it doesn't necessarily make
9 it constitutional, which is the sole issue in this
10 hearing.

11 MR. RAPHAEL: That's correct. Maybe I
12 don't have an objection as long as it's clear that
13 this testimony should not be permitted to suggest
14 that these studies approve what the City was
15 doing.

16 THE COURT: We've already been through
17 all that.

18 MR. RAPHAEL: And so -- is that correct?

19 THE COURT: I believe that's correct.

20 MR. RAPHAEL: Thank you, Your Honor.

21 THE COURT: I believe.

22 Except to this extent. We did these

1 studies. We learned things from them. And this
2 is what we did. Whether it's ultimately correct,
3 I'm going to decide.

4 MR. RAPHAEL: Yes, sir.

5 MR. THOMAS: That's for the Court.

6 Thank you.

7 BY MR. THOMAS:

8 Q Mr. Tuohy, what, if any, shopping for an
9 opinion has the City done with respect to
10 transfers from the water fund to the general fund?

11 A There's been no shopping at all.

12 Q All right. You mentioned the charter a
13 moment ago for the City of Falls Church. Which
14 section of the charter did you have in mind?

15 A It's in section 13 I believe .02, if
16 memory serves.

17 Q All right. And what did you
18 understand -- when you became CFO, what did you
19 understand that section of the charter to
20 indicate?

21 A It indicates that the City is allowed to
22 take a return on investment from its water fund.

1 Q All right. Now, once you became CFO,
2 what steps, if any, did you take to reevaluate the
3 City's financial relationship with its water
4 system?

5 A Well, I tried to understand what that
6 relationship was both on a, if you will, budgetary
7 standpoint and accounting standpoint. So I wanted
8 to understand, you know, the flow of activities,
9 how things got posted and all that kind of thing.
10 What you would normally do if you were taking over
11 as CFO for any organization.

12 Q Did you yourself engage any consultants
13 to assist you?

14 A Not right away. A little bit down the
15 pike, we did engage the firm of PJ Son to do an
16 analysis, a separate analysis of the water fund.

17 Q And why did you engage them?

18 A There were a couple things we wanted to
19 do take -- well, three things, actually,
20 specifically we wanted to take a look at.

21 One was to take a look at our
22 availability fees and to see whether they were

1 still appropriate.
 2 The second was to take a look at the
 3 administrative costs. We've talked about how, you
 4 know, certain people, me, for example, provide
 5 support for the water system. We do a transfer
 6 every year to recognize that. And was that still
 7 appropriate. In other words, the bases for it.
 8 Would we make a change or not? So somebody needed
 9 to go and take a look at that in somewhat more
 10 detail.

11 And the third was to take a look on the
 12 return on investment.

13 Q All right. And what, if anything, did
 14 you understand to be the alternatives available to
 15 the City with respect to its return on investment?

16 A PJ Son provided us with a document that
 17 had in his case three alternatives available.

18 MR. RAPHAEL: Your Honor, I object to
 19 the extent now he's getting into what someone else
 20 recommended or said. It's hearsay.

21 He's about to say they recommended, they
 22 said X, Y and Z. That's hearsay. He can't

1 express that hearsay opinion.

2 THE COURT: Well, does it really make
 3 any difference?

4 MR. RAPHAEL: Well, he -- yes.

5 THE COURT: I mean, is he going to say
 6 we did this because they recommended it?

7 MR. RAPHAEL: Well, I think, consistent
 8 with how Your Honor has ruled to date, he can say
 9 they did a report, we looked at it, and then
 10 here's what we did afterwards.

11 What he's not allowed to say is they
 12 recommended that we do X, Y and Z and we then did
 13 X, Y and Z. That's the line Your Honor has drawn,
 14 and --

15 THE COURT: Well, I have. I have.

16 But I wasn't certain that he said they
 17 recommended A, B, and C, and that we did A, B, and
 18 C. I thought these were alternatives to what they
 19 were doing now. That's the way I understood the
 20 question. Maybe I misunderstood it.

21 MR. RAPHAEL: I think he was about to
 22 say they recommended -- and he was about to say

1 what they recommended. And that's hearsay.

2 THE COURT: Mr. Thomas.

3 MR. THOMAS: My question is, what
 4 alternatives did the City understand what it had
 5 with respect to a return on equity. I think he
 6 can answer that without getting into hearsay
 7 territory.

8 THE COURT: All right. Let's try. I
 9 mean, a bomb's not going to go off if I hear
 10 something inadmissible. Oh, my goodness.

11 MR. RAPHAEL: I think that's a lawyerly
 12 way of asking the same question.

13 THE COURT: Well, perhaps. But let's
 14 just find out.

15 MR. RAPHAEL: It's still hearsay.
 16 Congratulations.

17 MR. THOMAS: Thank you very much.

18 MR. RAPHAEL: It's still hearsay.

19 BY MR. THOMAS:

20 Q Mr. Tuohy.

21 A My understanding is what was my
 22 understanding of options available to the City.

1 Q Correct. What did you understand the
 2 options to be available to the City with respect
 3 to taking a return on equity?

4 A Yes. My understanding is there were
 5 several options available to the City. One of
 6 them was a -- to continue to use the asset-based
 7 process that KPMG put forward in their memorandum
 8 which admittedly happened before I got there.

9 A second was something that was referred
 10 to as a traditional or a public service
 11 corporation methodology. That also was
 12 asset-based methodology.

13 And the third was a methodology that
 14 was -- we use the term "management fee." This is
 15 a revenue-based methodology. So it was a very
 16 different approach to get to where we wanted to be
 17 or where we were.

18 Q Okay. Based on your understanding,
 19 then, at the time of the various alternatives
 20 available to the City, what did the City do with
 21 respect to the return on equity for the water
 22 fund?

1 A The City adopted the revenue-based
2 methodology.

3 Q All right. And if you could, could you
4 explain to the Court what the revenue-based
5 methodology -- what you understand that to be and
6 how it's different from an asset-based
7 methodology.

8 A Certainly. Now, Your Honor, early on, I
9 described asset based as essentially taking assets
10 and then applying an interest rate against it.
11 And I think we're all fairly clear on that. We
12 had a lot of discussion on that yesterday.

13 The revenue base, if I may use an
14 analogy, is similar to a -- let's say you owned a
15 house and you hired a real estate agent to come in
16 and manage it.

17 The real estate agent charges you two
18 things. They'll charge you a management fee. It
19 might be 10 percent of the revenues that you get
20 from it. And they also charge you costs. So, for
21 example, if they have to replace a window or
22 something like that, you know, you're charged for

1 that.

2 The management fee is the profit, if you
3 will, of the person it takes to offset the two
4 risks that they have. One is the fact that
5 they're the guy who gets called up at 2 o'clock in
6 the morning. So there's that, if you will, down
7 side to it. They need to be recompensed for that.

8 And the other is the fact that, if the
9 window has to be replaced, they don't wait until
10 you pay for it to replace the window. They pay
11 for it and bill you for it. So they're actually
12 on the hook, at least for some period of time,
13 financially.

14 I don't want to stretch the analogy too
15 far for a water system. But it kind of gives you
16 that idea.

17 So essentially it was a way for us to
18 recognize the return we need to get for the risks
19 that we have doing the water system.

20 But the other thing that it does, and
21 this is the reason why I liked it -- and you
22 haven't asked this question, but I recommended we

1 take this particular approach -- is it's more
2 based on what's happening within the water system
3 and the 4 squares, if you will, of that year. So
4 it's clearly related to how the water system is
5 performing. If it purchases well, we get more.
6 If it performs poorly, we get less.

7 And that, again, is some recognition of
8 the risk that, you know, we run. So....

9 Q Okay.

10 A Does that answer the question?

11 Q It does. Thank you.

12 And I think you indicated that you
13 recommended that the City adopt the management fee
14 approach; is that right?

15 A Yes, I did.

16 Q All right. And what, in fact, did the
17 City do with respect to its methodology for
18 calculating a return on equity from the water
19 fund?

20 A It adopted the management fee --

21 Q All right.

22 A -- recommendation that I made.

1 Q All right. Now, you mentioned the
2 PJ Son firm. Did the City conduct itself in a way
3 consistent with its recommendations from the
4 PJ Son firm?

5 MR. RAPHAEL: Your Honor, I think that
6 gets into the substance of the recommendation and
7 violates the ruling you've established here.

8 MR. THOMAS: Judge, I'm --

9 THE COURT: I'm sorry. I was making a
10 note. What was the question again?

11 MR. THOMAS: My question was he had
12 mentioned the PJ Son firm. And I simply asked him
13 if the City had conducted itself consistent with
14 the recommendations from the PJ Son firm.

15 THE COURT: Well, I think the objection
16 is well taken. We don't need it.

17 Objection is sustained.

18 MR. THOMAS: Okay. Thank you, Judge.

19 THE COURT: Yes, sir.

20 BY MR. THOMAS:

21 Q Now, Mr. Tuohy, you've described the
22 City having adopted this ROE approach with the

1 management fee. What year was that?
 2 A I think the first we implemented was
 3 fiscal '07, if memory serves.
 4 Q Now, could you explain to the Court,
 5 Mr. Tuohy, what, if anything, disciplines the
 6 City's return on equity from the water fund.
 7 A Well, we can get to that a couple of
 8 different ways. I'll use the term sustainability,
 9 if that can work. And let's get at it two ways.
 10 The first way we can get at
 11 sustainability is that, if you think of everything
 12 we do to run the financial elements of the water
 13 fund as an equation. So we take, you know, all
 14 the expenses and, you know, all the potential
 15 revenues and all of that. And that comes down to
 16 a single extraordinarily important item, which is
 17 what do people pay for water.
 18 If you take a look at that and you can
 19 sort of back into it and say, okay, what are the
 20 different elements that go into that, and if the
 21 elements result in a reasonable amount for water,
 22 that you can impute that all the elements are

1 reasonable. If something gets out of wack, it's
 2 going to result in out-of-wack water.
 3 It's important in doing that that not
 4 only do you have a reasonable water rate but it
 5 has to be structured in such a way that going
 6 forward every year you're not going to have
 7 significant variations in the water rate. In
 8 other words, it can't be \$3.03 this year and \$9
 9 next year and \$2 the year after that.
 10 So when I talk about sustainability,
 11 it's sustainable both within the water fund itself
 12 that you're not doing any harm to it, if you will.
 13 But the proof is do you end up at the end of this
 14 equation with a reasonable water rate and a rate
 15 that can go from year to year to year without
 16 major variations. So that's one element.
 17 Another element to take a look at is a
 18 limiting or delimiting, or however you want to
 19 call it, is to take a look at the City charter.
 20 The City charter, we focused in on one part which
 21 is the part that says that the City may take a
 22 return on investment. And I think Your Honor said

1 that's really sort of key here.
 2 But we need to take a look at the second
 3 part as well because the General Assembly put in
 4 there that the return on investment needs to be
 5 done according to generally accepted accounting
 6 principles.
 7 So, in other words, clearly, we can't
 8 just willy-nilly take money out of the fund. We
 9 can't say, oh, we need 10 million bucks. We need
 10 to take 10 million bucks. You can't do that.
 11 You need to have a methodology that will
 12 be sustained by independent audit and that is
 13 based on generally accepted accounting principles.
 14 So you actually have two, if you will,
 15 controls over this -- the return on investment.
 16 Q Okay. Mr. Tuohy, are you familiar --
 17 has the City -- what has the City done, if
 18 anything, to disclose the return on equity taken
 19 from the water fund to the general fund?
 20 A If you take a look at our comprehensive
 21 annual financial report, it shows up two places.
 22 If you take a look at Schedule IX, if

1 memory serves, that's the schedule that shows the
 2 activity in the water fund during the course of
 3 the year. So you have, you know, revenues, and
 4 you have expenses and all that.
 5 And down at the bottom under
 6 nonoperating transfers, there's a line that
 7 specifically says transfer to the general fund.
 8 So that amount is discretely presented. It's not
 9 incorporated in any other element. So it's a
 10 discrete presentation.
 11 Then if you go over to note 3 in the
 12 financial statement, you'll see a discussion in
 13 there that shows two things. One, it shows how we
 14 got there. So it discusses the methodology in
 15 whether it was asset based or revenue based and
 16 all that. And then it specifically says what we
 17 do with it, which is the City Council appropriates
 18 it.
 19 So you have it both numerically. And if
 20 people want to find out what that means, you drill
 21 down to the footnote and it answers the question.
 22 This is -- when I talk about generally

1 accepted accounting principles, disclosure is one
2 of the driving principles in accounting.

3 Q All right. Are the City's CAFRs
4 publicly available?

5 A Yes, they are.

6 Q Going back how far?

7 A They're available on line for the past
8 4 years. Fiscal '09 is not done yet. So fiscal
9 '08 and earlier. And then I want to say at least
10 10 years are available in other public venues.

11 Q Are you familiar with the City's CAFRs
12 going back that far?

13 A Yes.

14 Q All right. And have you looked to see
15 whether the City has closed a transfer of ROE from
16 the water fund to the general fund in past CAFRs?

17 A Yes.

18 Q Okay. And what have you seen?

19 A That there's a consistent footnote
20 disclosure in there.

21 Q All right. Now, what fiscal year CAFR
22 did you first work on, if you will, when you

1 became the City's CFO?

2 A I came in the middle of the fiscal '04
3 CAFR. So, in other words, that was mostly done --
4 I started in September of '04.

5 Q Okay.

6 A So while I had some responsibility for
7 it, I didn't do the compilation, that part. The
8 first one that was fully under my venue, whatever
9 the proper term is, was the fiscal 2005.

10 Q All right. Now, with respect to the
11 fiscal 2005 CAFR, does that include a disclosure
12 with respect to a transfer from the water fund to
13 the general fund like we just discussed?

14 A Yes, it does.

15 Q All right. And at the time that
16 disclosure was made, did you understand it to be
17 consistent with GAAP?

18 A Yes.

19 Q All right. And with respect to the 2006
20 transfer as disclosed in the fiscal 2006 CAFR, did
21 you understand at the time that it was made --
22 that it was disclosed consistent with GAAP?

1 A Yes.

2 Q Same question with --

3 A Just to explain, by the way, GAAP is
4 generally accepted accounting principles.

5 Q And the same question with respect to
6 the 2007 CAFR.

7 A That's correct.

8 Q And 2008?

9 A Yes.

10 Q All right. What steps, if any,
11 Mr. Tuohy, has the City taken to fill any budget
12 shortfalls with money from the water fund?

13 A We haven't done that.

14 As I explained in my cook's tour
15 earlier, you don't feel the budget shortfall with
16 this. What happens is you come up with the
17 revenue is. We determine what that is up-front.
18 And it doesn't change regardless of the budget
19 situation at the end of the process.

20 So that becomes fixed in time. It's not
21 used to fill budget shortfalls. It's simply a
22 given.

1 Q All right. Mr. Tuohy, switching gears
2 just a little bit, are you familiar with any
3 effort on the part of Fairfax Water to acquire the
4 City's water system?

5 A Yes.

6 Q All right. And can you describe for the
7 Court when that came up and how it did.

8 A Are you talking about my personal
9 knowledge?

10 Q Yes. Your personal knowledge.

11 A My personal knowledge. When I got
12 hired, it was either shortly thereafter or shortly
13 before. I'm not quite sure. The City began some
14 discussions with the senior management of Fairfax
15 Water on various issues related to either the
16 acquisition of the water system or, you know,
17 potentially adjustments to the areas that we
18 serve. So a variety of topics.

19 But one of them certainly was the
20 acquisition by Fairfax County of the City of Falls
21 Church water system.

22 Q All right. How would you -- how would

1 you characterize that aspect of those discussions?

2 A It was pretty serious. We had, you
3 know, senior guys there. Chuck Murray was there.
4 And he's -- I mean, outside of the -- obviously
5 the members of the board, he's pretty much the
6 senior guy. Our City Manager was there. I was
7 participating as the finance person. The finance
8 guy from the Water Authority was there. Our
9 engineer was involved.

10 So there were a number of very senior
11 people participating in these discussions, yes.

12 Q And what resulted from those
13 discussions?

14 A The City did not choose to go forward
15 with selling the water system.

16 Q All right. And do you know why?

17 A Yes. We viewed the water system as a
18 very, very valuable asset. And you know seeing
19 this particular asset, we didn't really see the
20 benefit of the City for disposing of the asset at
21 this point.

22 Q What, if any, mention did Fairfax Water

1 make in the context of those negotiations about
2 any illegality of the City's water system?

3 A None whatsoever.

4 Q What opportunity, if any, did the senior
5 management of Fairfax Water have to make mention
6 of that?

7 A It had ample opportunity.

8 Q All right. From your perspective as the
9 City's CFO, what, if any, impact would such a
10 claim have had on those negotiations?

11 A Certainly if they had claimed that part
12 of our activity was illegal, that really goes to
13 the heart of the value of the system.

14 So, in other words, if you say that a
15 system, which is earning a fair rate of return,
16 all of a sudden you can't earn anything on it,
17 then that impairs that asset. So it would have a
18 pretty significant effect on what kind of
19 discussions we could have, yes.

20 Q Mr. Tuohy, you mentioned the AMR project
21 a moment ago. And I think you gave a little bit
22 of description to the Court about it.

1 Could you give a little bit more so the
2 Court understands what project that you were
3 describing.

4 A Certainly. We talked about the AMR
5 project, the automated meter reading project.
6 What we did is we replaced 100 percent of the
7 meters in our system, so approximately
8 35,000 meters, with meters that have a radio
9 transponder in it. This is done -- well, it cost
10 about \$8 million. It was a fairly consequential
11 project for us.

12 And over the course of time, what
13 happens is that now we're a little bit more
14 efficient. We can now read our entire system in a
15 week instead of we used to take a month.

16 So we've been able to recognize those
17 efficiencies. We've been able to reduce headcount
18 which of course reduces the cost of the system
19 because you don't need to have a guy walking
20 around. I mean, you drive by in a truck.

21 So we did -- it was a very extensive
22 project. It puts us -- I don't know if there's

1 any other system in Northern Virginia has AMR. I
2 know Fairfax Water doesn't. Neither does Vienna.

3 But I'm wandering off. Sorry.

4 Q That's all right. I think you mentioned
5 \$8.1 million --

6 A That's correct.

7 Q -- was the total cost?

8 A Yes.

9 Q All right. And how did the City pay for
10 that?

11 A Partly we paid for it with cash and
12 partly through bonds.

13 Q Can you explain to the Court what the
14 division is for that.

15 A I'd say probably about \$5 million it was
16 paid for by bonds. And then the remainder was
17 cash.

18 These are general obligation bonds.
19 They were part of an issue we did a couple years
20 ago.

21 Q All right. Now, what effect, if any,
22 would the claim of the City's water rates and

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1 charges were unlawful have had on the AMR project?
2 MR. RAPHAEL: Your Honor, I think there
3 there's not a proper foundation for this. The
4 question goes to what the City Council would have
5 done. And he's not competent to speculate or
6 opine about that.
7 THE COURT: Didn't he answer that
8 question earlier by saying that, in these
9 negotiations, if it would have been suggested to
10 us that what we deemed a very valuable asset was,
11 in fact, being run illegally that we would have to
12 factor it in, making the point it was not done at
13 that time, and whatever point is being made?
14 MR. THOMAS: If I could, my question to
15 the CFO was how did the City go about paying for
16 this project.
17 THE COURT: Right. He answered that.
18 MR. THOMAS: Right. And the effect of
19 this claim, had it not been brought, you know, so
20 late, which is to say in January of this year, he
21 can testify about the effect that an earlier claim
22 would have had on how they would have gone about

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1 financing or even doing that project. And he's
2 uniquely the person that can say --
3 THE COURT: But, ultimately, the Council
4 would have made the decision, would they not? And
5 so, "Oh, we've got something we better worry about
6 here. Let's go ahead and do it. Maybe we better
7 not do it."
8 MR. THOMAS: That may be, and they would
9 have done so certainly on his recommendation.
10 Because he -- again, I mean, he's -- I think we've
11 established that he is at the center of that
12 project. I mean, it's -- he's the chief finance
13 officer of the City. This is a --
14 THE COURT: I'm going to let him answer
15 the question.
16 MR. RAPHAEL: Your Honor, there's no
17 foundation here. I mean, it calls for speculation
18 about what he would have recommended and what the
19 Council would have done on a recommendation.
20 THE COURT: Well, I think, given the
21 fact that he was permitted to answer the prior
22 question, we have a clue as to what his judgment

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1 would have been had he known the legal challenge
2 might have -- not a legal challenge, but a
3 suggestion that the system, the budgetary system,
4 the heart of it, was in fact illegal.
5 I'm going to permit it.
6 MR. THOMAS: Thank you, Judge.
7 THE COURT: Objection overruled.
8 BY MR. THOMAS:
9 Q Mr. Tuohy, what effect, if any, would a
10 claim of unlawfulness of the City's rates and
11 charges have had on a recommendation you made
12 about the AMR project?
13 A Okay. Well, there's two elements to it.
14 Let me break it into two.
15 One is the financing the project.
16 Clearly, I would not have recommended a general
17 obligation bond to put the citizenry on the hook
18 for something that could potentially be held
19 illegal.
20 So we would have had to have done a
21 revenue bond in that case. So the effect of that
22 obviously would have increased the cost to operate

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1 the system. But it would have inoculated the City
2 against liability for the debt. So that one is I
3 think pretty clear.
4 The other one is the actual
5 implementation of the system itself. Something
6 that hasn't been clear about this, by the way, is
7 that the AMR project falls under customer service
8 which reports to me. So this is not an
9 engineering question. This really is a customer
10 service question.
11 I would have been very, very reluctant
12 to go forward with a major capital expenditure of
13 this sort knowing that there was some question
14 regarding the operations of our system. It would
15 have been -- I could not have in good conscience
16 made the recommendation to the City Council.
17 Q Okay. You mentioned the -- certain
18 improvements along Route 50 --
19 A Yes.
20 Q -- that have been carried out by the
21 City I believe now. Would you just briefly
22 explain to the Court what those improvements are.

1 A Certainty. The improvement is an
2 expansion to the water main. And I don't know
3 exactly the sizes, but about -- you know, when you
4 make a main bigger, it's a factor of four to the
5 size. So it's quadrupling the size of the main.

6 This is done with the intent to ensure
7 we have sufficiency of water supply along the area
8 particularly out to the Merrifield area where
9 there's a good deal of planned construction over
10 the next decade or so.

11 Q And how is that project being funded?

12 A That's being funded entirely through
13 general obligation bonds.

14 Q And in what amount?

15 A That particular project itself is about
16 3-1/2 million out of the 5-1/2 million that we
17 reasonably issued.

18 Q And what effect, if any, would a claim
19 of unlawfulness of the City's rates and charges
20 would have had on your recommendation in
21 connection of how to finance that project?

22 MR. RAPHAEL: Same objection as before.

1 THE COURT: All right. Same ruling.

2 THE WITNESS: In this case, the question
3 was the financing of the project itself. So I
4 think I'm pretty comfortable in answering that.

5 Again, there was no way that I would
6 issue general obligation bonds if the City's
7 activities in the water fund would be considered
8 improper. Again, I would have done revenue bonds,
9 and that would have increased the cost.

10 BY MR. THOMAS:

11 Q Now, Mr. Tuohy, I believe you were here
12 earlier when there was some testimony about the
13 Tysons Corner improvements.

14 Do you have an understanding of how the
15 Tysons Corner improvements were funded?

16 A Yes.

17 Q All right. Could you explain to the
18 Court how they were funded.

19 A Certainly. The first phase, which was
20 the water tank, was cash funded. We've used the
21 term "pay as you go." But the difference is there
22 is no difference. Cash funded.

1 The second portion, major portion is the
2 Scotts Run pump station, and that was funded
3 through general obligation bonds. I want to say
4 2 million or so. But I can't remember the exact
5 amount.

6 But anyway, it was funded through
7 general obligation bonds.

8 Q All right. Thank you.

9 MR. THOMAS: Judge, I'm at a pretty good
10 breakpoint.

11 THE COURT: Okay.

12 MR. THOMAS: I'm sensitive to the
13 Court's schedule. If the Court would like to
14 break for the day.

15 THE COURT: This is fine. I've got to
16 George Mason and educate a new generation of
17 lawyers.

18 Let's see. We're starting at 9 o'clock
19 tomorrow morning.

20 MR. THOMAS: Okay. I think that's
21 right.

22 And just for scheduling purposes, Judge,

1 at the moment, my expectation, and I've indicated
2 it this to Mr. Raphael, is that Mr. Tuohy will be
3 our final witness in our case.

4 And so, if that helps the Court, I mean,
5 I expect --

6 THE COURT: Well, it does. Because I
7 thought we would go till 5:00 tomorrow. But I
8 completely overlooked something. We'll have to
9 stop at 3 if we're not done. And if we're very
10 close to getting done, then we'll start at 8 on
11 Thursday morning and go for 2 hours. Because I've
12 got something that was preset for me at 10.

13 So we'll get it done. We'll be okay.

14 Okay. Great? Anything else? Everybody
15 else okay?

16 All right. We'll be adjourned until
17 9 o'clock tomorrow morning.

18 (Whereupon, at 4:02 p.m., the hearing
19 recessed, to reconvene at 9:00 a.m. on Wednesday,
20 September 23, 2009.)

21

22

CERTIFICATE OF NOTARY PUBLIC

1
2 I, Vicky Reiner, RMR, CRR, the officer before
3 whom the foregoing hearing was taken, do hereby
4 certify that said transcript is a true record of
5 the proceedings; that I am neither counsel for,
6 related to, nor employed by any of the parties to
7 the action; and further that I am not a relative
8 or employee of any attorney or counsel employed by
9 the parties thereto, nor financially or otherwise
10 interested in the outcome of the action.

11
12
13 _____
14 Notary Public
15 in and for the
16 Commonwealth of Virginia

17
18 My Commission expires:
19 December 31, 2011
20 Registration No. 7117657

21
22